90-3881

No. _____

Supreme Court, U.S.
FILED
AUG 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

DOW CHEMICAL COMPANY AND
SHELL OIL COMPANY,

Petitioners,

v.

DOMINGO CASTRO ALFARO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR WRIT OF CERTIORARI

F. WALTER CONRAD
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1234

Counsel for Petitioner
Dow Chemical Company

BURT BALLANFANT
Shell Oil Company
4794 One Shell Plaza
P.O. Box 2463
Houston, Texas 77252
(713) 241-7023

Counsel for Petitioner
Shell Oil Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

I. QUESTION PRESENTED FOR REVIEW

Whether the Texas Supreme Court's interpretation of section 71.031 of the Texas Civil Practice and Remedies Code to preclude dismissal on the ground of forum non conveniens of a lawsuit in Texas state court by Costa Rican plaintiffs against petitioners based on events arising solely in Costa Rica and involving witnesses and evidence located almost exclusively in Costa Rica renders that statute unconstitutional as applied to petitioners because it violates petitioners' rights to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

II. LIST OF ALL PARTIES

Petitioners, defendants below, are Dow Chemical Company ("Dow") and Shell Oil Company ("Shell"). Pursuant to Supreme Court Rule 28.1, a list of all of Dow's parents, subsidiaries, and affiliates is attached as Appendix 7, at App. 108-113. A list of Shell's parents, subsidiaries, and affiliates is attached as Appendix 8, at App. 114-20.

Respondents, plaintiffs below, are thirty-five Costa Rican nationals. A list of all respondents is attached as Appendix 9, at App. 121.

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V. OPINIONS BY OTHER COURTS

The unpublished order of the 61st Judicial District Court of Harris County, Texas, dated June 22, 1987, dismissing this action on the basis of forum non conveniens is reproduced as Appendix 3, at App. 99-101.

The decision of the Court of Appeals for the First Supreme Judicial District of Texas at Houston is styled *Alfaro v. Dow Chemical*, 751 S.W.2d 208 (Tex. App. – Houston [1st Dist.] 1988), and is reproduced as Appendix 2, at App. 89-98.

The decision of the Supreme Court of Texas is styled *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990), and is reproduced as Appendix 1, at App. 1-88.

VI. STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Texas was rendered on March 28, 1990, and is reproduced as Appendix 5, at App. 105-06.

Petitioners' joint motion for rehearing before the Supreme Court of Texas was overruled by that court on May 2, 1990. The order overruling petitioners' motion for rehearing is reproduced as Appendix 4, at App. 102-04.

On June 4, 1990, the Honorable Byron R. White, Associate Justice of this Court, granted petitioners an extension of time to file their petition for writ of certiorari up to and including August 30, 1990. Justice White's order granting this extension of time is reproduced as Appendix 6, at App. 107.

This Court has jurisdiction to review the judgment of the Supreme Court of Texas by writ of certiorari pursuant to 28 U.S.C. § 1257(a) because the validity of a state statute is drawn into question as being repugnant to the Constitution of the United States and because petitioners are claiming a right under the Constitution of the United States.

VII. CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the Fourteenth Amendment to the United States Constitution states as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Section 71.031 of the Texas Civil Practice and Remedies Code provides as follows:

§ 71.031 Act or Omission out of State

> (a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the

death or injury takes place in a foreign state or country, if:

(1) a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;

(2) the action is begun in this state within the time provided by the laws of this state for bringing the action; and

(3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.

(b) All matters pertaining to procedure in the prosecution or maintenance of the action in the courts of this state are governed by the law of this state.

(c) The court shall apply the rules of substantive law that are appropriate under the facts of the case.

Tex. Civ. Prac. & Rem. Code Ann. § 71.031 (Vernon 1986).

VIII. STATEMENT OF THE CASE

This action is one of four lawsuits across the United States that have been filed by the same attorneys against essentially the same defendants and involving identical facts. The other three lawsuits – two brought in Florida and one in California – were dismissed on the grounds of forum non conveniens.

The first action was brought in Florida state court in 1983 by fifty-eight Costa Rican plaintiffs against Dow and Shell. That action was removed to federal court, where it

was dismissed under the doctrine of forum non conveniens. A copy of the unpublished order of dismissal in *Sibaja v. Dow Chemical Co.*, No. 83-1347-CIV-JLK (S.D. Fla. Aug. 25, 1983), is reproduced as Appendix 15, at App. 149-55. This dismissal was affirmed by the United States Court of Appeals for the Eleventh Circuit. *See Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir.), *cert. denied*, 474 U.S. 948, 106 S. Ct. 347 (1985).

Plaintiffs' counsel then filed an action in California state court in October 1985. In this action, thirty-four Costa Rican plaintiffs sued Dow, Shell, and Amvac Chemical Company. That case was removed to the United States District Court for the Middle District of California, where it was dismissed based on the doctrine of forum non conveniens. *Aguilar v. Dow Chemical Co.*, No. 86-4753 (C.D. Cal. Dec. 23, 1986). A copy of the unpublished dismissal order in *Aguilar* is reproduced as Appendix 16, at App. 156-71.

Following the dismissal in *Aguilar*, the plaintiffs from *Sibaja*, *Aguilar*, and this action, along with thirty-eight new plaintiffs, filed another action in Florida state court. This action was also removed to federal court, where it was dismissed on the basis of forum non conveniens. *See Barrantes Cabalceta v. Standard Fruit Co.*, 667 F. Supp. 833, 837-38 (S.D. Fla. 1987), *aff'd in part, rev'd in part*, 883 F.2d 1563 (11th Cir. 1989).

Following the dismissal of the first Florida action, counsel for plaintiffs filed this action in state court in Texas in April 1984. This action was originally brought by eighty-two agricultural workers and their wives, all citizens and residents of Costa Rica, who alleged personal

injuries to the workers as a result of exposure to pesticides containing the chemical dibromochloropropane ("DBCP"). The alleged exposure occurred in Costa Rica.

Plaintiffs asserted causes of action under § 71.031 of the Texas Civil Practice and Remedies Code based upon negligence, strict liability, and breach of implied warranty. Plaintiffs claimed that defendants Dow and Shell designed, manufactured, sold or distributed the products containing DBCP.

Dow and Shell filed motions to dismiss the Texas case based on the trial court's lack of jurisdiction over the plaintiffs' claims and on the doctrine of forum non conveniens. The trial court denied the motions to dismiss for lack of jurisdiction, but granted petitioners' motions to dismiss on the ground of forum non conveniens. The unpublished order of the 61st Judicial District Court of Harris County, Texas, dated June 22, 1987, dismissing this action on the basis of forum non conveniens is reproduced as Appendix 3, at App. 99-101.

Plaintiffs appealed the order of dismissal to the Court of Appeals for the First Supreme Judicial District of Texas at Houston, the intermediate state appellate court. The decision of the First Court of Appeals is styled *Alfaro v. Dow Chemical*, 751 S.W.2d 208 (Tex. App. – Houston [1st Dist.] 1988), and is reproduced as Appendix 2, at App. 89-98. The three-judge panel of that court held, with one judge dissenting, that § 71.031 of the Texas Civil Practice and Remedies Code and its statutory predecessors had abolished the common-law doctrine of forum non conveniens in Texas. 751 S.W.2d at 211; Appendix 2 at App.

95-97. The trial court's dismissal of this case was reversed on that basis. *Id.*

Petitioners appealed to the Supreme Court of Texas by filing separate applications for writ of error with that court on July 18, 1988. The Supreme Court of Texas, with four justices dissenting, affirmed the decision of the First Court of Appeals that the common law doctrine of forum non conveniens had been abolished in Texas. The Texas Supreme Court's decision is styled *Dow Chemical v. Alfaro*, 786 S.W.2d 674 (Tex. 1990), and is reproduced as Appendix 1, at App. 1-88. Petitioners timely requested rehearing before the Texas Supreme Court. Petitioners' joint motion for rehearing before the Supreme Court of Texas was overruled by that court on May 2, 1990. The order overruling petitioners' motion for rehearing is reproduced as Appendix 4, at App. 102-04.

IX. FEDERAL QUESTIONS RAISED BELOW

Petitioners raised the federal question sought to be reviewed in their motions for rehearing before the Court of Appeals for the First Supreme Judicial District at Houston. Relevant portions of Dow's motion for rehearing are reproduced as Appendix 10, at App. 122-26. Relevant portions of Shell's motion for rehearing are reproduced as Appendix 11, at App. 127-131.

The majority opinion of the Court of Appeals did not address petitioners' federal question. *See* 751 S.W.2d at 208-11; Appendix 2, at App. 89-97. However, in dissent, Justice Duggan of that court argued that the majority's decision would subject § 71.031 to "well-deserved due

process attacks." *See* 751 S.W.2d at 211; Appendix 2 at App. 97.

Petitioners also raised the federal questions sought to be reviewed in their applications for writ of error to the Supreme Court of Texas. Relevant portions of Dow's application for writ of error are reproduced as Appendix 12, at App. 132-35. Relevant portions of Shell's application for writ of error are reproduced as Appendix 13, at App. 136-39.

Despite the fact that a substantial portion of petitioners' applications for writ of error were devoted to the federal question that petitioners seek to bring before this Court, the majority opinion of the Supreme Court of Texas failed to address petitioners' due process arguments, thereby implicitly rejecting them. *See* 786 S.W.2d at 674-79; Appendix 1, at App. 1-12. Although the concurring opinion of Justice Doggett discussed due process in a footnote, that opinion failed to meaningfully address petitioners' due process arguments by recasting them in terms of minimum contacts. 786 S.W.2d at 685 n.8; Appendix 1, at App. 28-30 (Doggett, J., concurring). In his dissenting opinion, however, Texas Supreme Court Justice Eugene Cook observed that the decision of the majority of the Texas Supreme Court "allows assertions of personal jurisdiction by Texas courts that are so unfair and unreasonable as to violate the due process clause of the federal constitution." 786 S.W.2d at 697; Appendix 1, at App. 60 (Cook, J., dissenting).

Petitioners again raised the federal question sought to be reviewed in their joint motion for rehearing before the Supreme Court of Texas. Relevant portions of this

motion are reproduced as Appendix 14, at App. 140-48. The order denying petitioners' motion for rehearing did not address the federal question raised by petitioners. *See* Appendix 4, at App. 102-04.

X. REASONS FOR ALLOWANCE OF THE WRIT

The Texas Supreme Court's interpretation of section 71.031 to preclude dismissal on the grounds of forum non conveniens in this case violates petitioners' Fourteenth Amendment guarantee of due process of law.

This very issue was recognized more than two years ago by Fifth Circuit Judge Thomas Gee, who observed:

> No one can say whether Texas courts will place upon this statute [§ 71.031] the construction . . . that Texas has constituted itself the world's forum of final resort, where suit for personal injury or death may always be filed if nowhere else. . . . *[A]t some point considerations of due process are doubtless implicated when a defendant is required to stand trial at the opposite end of the earth from the location of witnesses, site of the accident, etc.*

Exxon Corp. v. Chick Kam Choo, 817 F.2d 307, 314 & n.8 (5th Cir. 1987) (emphasis supplied), *rev'd on other grounds*, 486 U.S. 140, 108 S. Ct. 1684 (1988).

This Court has long interpreted the due process clause of the Fourteenth Amendment to prohibit states from asserting jurisdiction over a defendant unless the defendant has "minimum contacts" with the forum state

and the exercise of jurisdiction would not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945). This Court has made it clear that the "fair play and substantial justice" requirement of due process must be satisfied in addition to the "minimum contacts" requirement. As this Court has often stated, the hallmarks of due process are fairness and reasonableness to the defendant. *Kulko v. Superior Court of California*, 436 U.S. 84, 92, 98 S. Ct. 1690, 1697 (1978).

This Court has also made it clear that due process considerations prohibit the exercise of jurisdiction over a defendant if, as in this case, the litigation would be so difficult and inconvenient that the defendant is unfairly at a severe disadvantage in comparison to the plaintiff. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174 (1985), this Court explained that both the "minimum contacts" and the "fair play and substantial justice" components of the due process analysis must be satisfied before a court may exercise jurisdiction over a defendant consistent with the due process clause of the Fourteenth Amendment. This Court stated:

> Once it has been decided that a defendant purposefully established minimum contacts with the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice."
>
> . . . .
>
> [W]here a defendant who purposefully has directed his activities at forum residents seeks to

> defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. . . . Nevertheless, minimum requirements inherent in the concept of "fair play and substantial justice" may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities. As we previously have noted, jurisdictional rules may not be employed in such a way as to make litigation "so gravely difficult and inconvenient" that a party unfairly is at a "severe disadvantage" in comparison to his opponent.

Id. at 476-78 (quoting *International Shoe*, 326 U.S. at 320).

In *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 107 S. Ct. 1026 (1987), this Court removed any doubt that "fair play and substantial justice" component of due process could defeat the jurisdiction of a trial court, independent of whether, as here, the minimum contacts component of due process was satisfied.

In *Asahi Metal*, this Court addressed the propriety of the State of California's exercise of personal jurisdiction over a Japanese corporation that had few contacts with the state. The Court unanimously held that even in situations where the defendant had engaged in purposeful activities in the forum state, due process required that the court consider additional factors to determine whether the exercise of jurisdiction comported with fair play and substantial justice. This Court concluded that if the evaluation of those factors led to the conclusion that the assertion of jurisdiction would be unreasonable, due process required that California refrain from exercising jurisdiction over the defendant. Applying the relevant factors,

this Court held that consideration of fair play and substantial justice dictated that the trial court's exercise of jurisdiction over the defendant in that case would violate due process.

Justice Brennan, writing in concurrence, and quoting from his opinion in *Burger King Corp. v. Rudzewicz* noted that:

> This is one of those rare cases in which "minimum requirements inherent in the concept of 'fair play and substantial justice' . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities."

Asahi Metal, 480 U.S. at 116.

It is apparent, therefore, that even if petitioners have allegedly had substantial contacts with Texas, the due process requirement is not necessarily satisfied in this case. Instead, as this Court has made clear, it is also necessary to determine whether maintenance of this action in the Texas state court would offend traditional notions of fair play and substantial justice and therefore violate due process of law.[1]

Absent forum non conveniens, maintenance of this action in Texas would not comport with fair play and

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[1] Petitioners have never disputed that the minimum contacts component of due process is satisfied in this case. Petitioners' contacts with the forum, however, are only relevant to the first component of the due process analysis, which defendants agree that they meet. Nevertheless, as this Court has made clear, a defendant who meets the minimum contacts test is subject to the court's jurisdiction only if the "fair play and substantial justice" component of due process is also satisfied.

substantial justice and would therefore violate petitioners' right to due process of law. As Justice Brennan explained in *Burger King*, as an alternative to a due process jurisdictional challenge, a defendant who had "minimum contacts" with the forum, but who was claiming substantial inconvenience, could "seek a change of venue," referring to 28 U.S.C. § 1404(a), the venue transfer statute, which "embodies in an expanded version the common-law doctrine of forum non conveniens." *Burger King*, 471 U.S. at 477 & n.20.[2] Justice Brennan reasoned that, in the ordinary case, a change of venue or the doctrine of forum non conveniens could effectively resolve most instances of severe inconvenience, without the necessity of a constitutional due process inquiry. As Justice Brennan explained:

> Most such considerations [of inconvenience] usually may be accommodated through means short of finding jurisdiction unconstitutional. . . . [A] defendant claiming substantial inconvenience may seek a change of venue.

Id. If, however, a jurisdiction has rejected forum non conveniens, as a majority of the Supreme Court of Texas has done in this case, a due process inquiry is necessary to prevent egregious inconvenience to defendants. Section 71.031 – as interpreted by the Texas Supreme Court

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[2] In his dissenting opinion in the Texas Supreme Court, Justice Cook argued that this Court has expressed the view that forum non conveniens dismissal as a mechanism to "bridge . . . the gap between constitutional doctrines of jurisdiction and problems arising from inconvenient forums" and prevent otherwise well-founded due process challenges to personal jurisdiction. *See also* Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 S. Cal. L. Rev. 913, 922-23 (1985).

– never permits a dismissal under the doctrine of forum non conveniens, no matter how inconvenient a forum Texas may be for petitioners, or how basically unfair the maintenance of the action in a Texas forum might be. Under the circumstances of this case, and absent forum non conveniens, petitioners' due process rights will plainly be violated if this case is tried in Texas.

It is well-established that due process requires a fair and impartial trial before a competent tribunal, which includes not only an opportunity to be heard, but also a reasonable opportunity to *prepare* for the hearing. *See Landon v. Plasencia*, 459 U.S. 21, 37 (1982). Petitioners' due process rights will be compromised because the unavailability of proof can deny to the defendant a meaningful opportunity to be heard. *See* U.S. Const. amend. XIV, § 1; *see also Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191 (1965) (due process includes the opportunity to be heard in "a meaningful manner").[3] It is clear in this case that the inability of Dow and Shell

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[3] The "fair trial" factors as applied to these claims by Costa Rican nationals have been described as follows:

> [T]he alleged injuries occurred in Costa Rica. All the Plaintiffs are Costa Rican. Most of the evidence and witnesses are in Costa Rica and none are in [this state] and compulsory process would not be available to compel production of this evidence or the attendance of these witnesses. The cost of obtaining the evidence from Costa Rica would be substantial, if possible. The Defendants would not be able to implead potential third party defendants located in Costa Rica in this action. . . .

(Continued on following page)

to join proper third parties or to do necessary discovery fundamental to their defense puts them at a distinct and severe disadvantage in comparison to plaintiffs.

Petitioners will be denied access to sources of proof essential to their defense. Plaintiffs' counsel has admitted that not all of the plaintiffs' treating doctors will be available for examination by Dow and Shell. Additionally, there is no assurance that all of the plaintiffs' medical records will be produced, or that all pertinent records from the plaintiffs' Costa Rican employer will be produced. Plaintiffs have no control over these persons or their documents; a Texas court cannot compel them to testify or to produce documents, and Dow and Shell have no independent means to acquire that testimony or to compel production of those documents. *See* affidavit of Rodrigo Blanco Fernandez, p. 4, Tr. 690.

Furthermore, petitioners' defense will be impaired because they will be unable to join third-parties who are not subject to the jurisdiction of the Texas trial court. It is highly unlikely that a Texas court would be able to obtain personal jurisdiction over any Costa Rican third parties that should be joined in the lawsuit.

(Continued from previous page)

Sibaja v. Dow Chemical Co., 757 F.2d 1215, 1217 n.5 (11th Cir.), *cert. denied*, 474 U.S. 948, 106 S. Ct. 347 (1985) (quoting with approval district court's decision). Indeed, every trial court to consider the propriety of these foreign plaintiffs' lawsuits against petitioners in the United States has concluded that trial here would be grossly inconvenient. *See, e.g., Barrantes Cabalceta v. Standard Fruit Co.*, 667 F. Supp. 883, 837-38 (S.D. Fla. 1987), *aff'd in part, rev'd in part*, 883 F.2d 1563 (11th Cir. 1989); *Aguilar v. Dow Chemical Co.*, No. 86-4753 (C.D. Cal. 1986).

These factors, and others, would put Dow and Shell at a distinct disadvantage relative to the plaintiffs if the case were tried in Texas. For instance, the plaintiffs would be able to rely upon only the most favorable physicians' testimony and records, without the plaintiffs' full medical history being examined. Further, the plaintiffs are obviously familiar with the site and mechanism of their alleged exposure. In contrast, there is no assurance that Dow and Shell or their representatives would be granted access by the plaintiffs' employer to the site of the alleged exposures. Dow's and Shell's understanding of the mechanism of the alleged exposure will therefore be severely compromised relative to the plaintiffs. Finally, the probability that Dow and Shell will be unable to join as parties those persons or entities who may have been responsible for the construction and sale of the injector or application devices apparently used by the plaintiffs to apply the pesticides, when they supposedly came into contact with the pesticides, would further disadvantage them in that they would be unable to compel any information from those parties, and would be unable to seek contribution from those parties in the event that a judgment is rendered against Dow and Shell.

The sum of these disadvantages plainly deprives petitioners of due process of law. The Texas Supreme Court's interpretation of section 71.031 prevents a Texas trial court from acting to prevent that injustice on nonconstitutional grounds and the majority of the Texas Supreme Court has rejected petitioners' claim that if § 71.031 precludes dismissal on the basis of forum non conveniens in this case, that provision operates to deprive petitioners of due process of law.

This Court should grant Dow's and Shell's petition for writ of certiorari and conclude that § 71.031, as interpreted by the Texas Supreme Court to preclude dismissal of this action on the grounds of forum non conveniens and therefore require that petitioners to defend this action in the Texas state court, deprives petitioners of due process of law.

XI. CONCLUSION

For the reasons stated above, petitioners Dow Chemical Company and Shell Oil Company request that the Court grant their petition for writ of certiorari and, after full briefing and argument, issue a final decision reversing the judgment of the Supreme Court of Texas in this case.

Respectfully submitted,

F. WALTER CONRAD
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1234

Counsel for Petitioner
Dow Chemical Company

BURT BALLANFANT
Shell Oil Company
4794 One Shell Plaza
P. O. Box 2463
Houston, Texas 77252
(713) 241-7023

Counsel for Petitioner
Shell Oil Company

APPENDIX 1

Opinions of the Texas Supreme Court in Dow Chemical Co. v. Castro Alfero, 786 S.W.2d 674 (1990)

DOW CHEMICAL COMPANY and Shell Oil Company, Petitioners,

v.

Domingo CASTRO ALFARO et al., Respondents.

No. C-7743.

Supreme Court of Texas.

March 28, 1990.

Rehearing Overruled May 2, 1990.

OPINION

RAY, Justice.

At issue in this cause is whether the statutory right to enforce a personal injury or wrongful death claim in the Texas courts precludes a trial court from dismissing the claim on the ground of forum non conveniens. The court of appeals held that Texas courts lack the authority to dismiss on the grounds of forum non conveniens. 751 S.W.2d 208. Because we conclude that the legislature has statutorily abolished the doctrine of forum non conveniens in suits brought under section 71.031 of the Texas Civil Practice and Remedies Code, we affirm the judgment of the court of appeals.

Domingo Castro Alfaro, a Costa Rican resident and employee of the Standard Fruit Company, and eighty-one

other Costa Rican employees and their wives brought suit against Dow Chemical Company and Shell Oil Company. The employees claim that they suffered personal injuries as a result of exposure to dibromochloropropane (DBCP), a pesticide manufactured by Dow and Shell, which was allegedly furnished to Standard Fruit. The employees exposed to DBCP allegedly suffered several medical problems, including sterility.

Alfaro sued Dow and Shell in Harris County district court in April 1984. The amended petition alleged that the court had jurisdiction under article 4678 of the Revised Statutes.[1] Following an unsuccessful attempt to remove the suit to federal court, Dow and Shell contested the jurisdiction of the trial court almost three years after the filing of the suit, and contended in the alternative that the case should be dismissed under the doctrine of forum non conveniens. Despite a finding of jurisdiction, the trial court dismissed the case on the ground of forum non conveniens.

Section 71.031 of the Civil Practice and Remedies Code provides:

> (a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the

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[1] Although article 4678 was in effect at the time suit was originally brought, this cause is governed by section 71.031 of the Civil Practice and Remedies Code because no substantive change was intended by the legislature's recodification. *See* Tex.Civ.Prac. & Rem.Code Ann. § 1.001(a) (Vernon Supp.1989).

death or injury takes place in a foreign state or country, if:

(1) a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;

(2) the action is begun in this state within the time provided by the laws of this state for beginning the action; and

(3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.[2]

(b) All matters pertaining to procedure in the prosecution or maintenance of the action in the courts of this state are governed by the law of this state.

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[2] The United States and Costa Rica agreed to the following:

> The citizens of the high contracting parties shall reciprocally receive and enjoy full and perfect protection for their persons and property, and shall have free and open access to the courts of justice in the said countries respectively, for the prosecution and defense of their just rights; and they shall be at liberty to employ, in all cases, the advocates, attorneys, or agents of whatever description, whom they may think proper, and they shall enjoy in this respect the same rights and privileges therein as native citizens.

Treaty of Friendship, Commerce, and Navigation, July 10, 1851, United States-Costa Rica, art. VII, para. 2, 10 Stat. 916, 920, T.S. No. 62. Subsection (a)(3) requires the existence of similar treaty provisions before an action by a citizen of a foreign country may be maintained under Section 71.031.

(c) The court shall apply the rules of substantive law that are appropriate under the facts of the case.

Tex.Civ.Prac. & Rem.Code Ann. § 71.031 (Vernon 1986). At issue is whether the language "may be enforced in the courts of this state" of Section 71.031(a) permits a trial court to relinquish jurisdiction under the doctrine of forum non conveniens.

The statutory predecessors of Section 71.031 have existed since 1913. The original law states "[t]hat whenever the death or personal injury of a citizen of this State or of a country having equal treaty rights with the United States on behalf of its citizens, has been or may be caused by a wrongful act, neglect or default . . . such right of action may be enforced . . . in the courts of this State . . . . " Act of Apr. 8, 1913, ch. 161, 33d Leg., 1913 Tex.Gen.Laws 338, 338-39, *repealed by* Revised Statutes, § 2, 39th Leg., 1925 Tex.Rev.Civ.Stat. 2419. Another act was passed in 1917 to expand the right of action to citizens of the United States. Act of Mar. 30, 1917, ch. 156, 35th Leg., 1917 Tex.Gen.Laws 365, *repealed by* Revised Statutes, § 2, 39th Leg., 1925 Tex.Rev.Civ.Stat. 2419. The statute was codified in 1925 and amended in 1975. Revised Statutes, sec. 1, art. 4678, 35th Leg., 1925 Tex.Rev.Civ.Stat. 2, 1283, *amended by* Act of May 29, 1975, ch. 530, § 2, 64th Leg., 1975 Tex.Gen.Laws 1381, 1382, *repealed by* Civil Practice and Remedies Code, ch. 959, § 9, 69th Leg., 1985 Tex.Gen.Laws 3242, 3322. The 1975 amendment allowed Texas courts to apply the law of the state of Texas in actions arising under old article 4678. The amendment responded to this court's decision in *Marmon v. Mustang Aviation*, which held that the doctrine of lex loci delicti applied to old article 4678. *Marmon v.*

Mustang Aviation, Inc., 430 S.W.2d 182 (Tex.1968); *see Gutierrez v. Collins*, 583 S.W.2d 312, 317-18 n. 3 (Tex. 1979).

Dow and Shell argued before this Court that the legislature did not intend to make section 71.031 a guarantee of an absolute right to enforce a suit in Texas brought under that provision. In his dissent, Justice Gonzalez agrees, concluding that the legislature could not have intended to preclude application of forum non conveniens to suits brought under the statute because "*[f]orum non conveniens* did not arrive upon the judicial landscape of this state until after the predecessors to section 71.031 were enacted." 786 S.W.2d 691. This conclusion is false. The doctrine of forum non conveniens appeared in Texas well before the enactment of article 4678 by the legislature in 1913.

I.

The doctrine of *forum non conveniens* arose from the doctrine of *forum non competens* in Scottish cases. *See, e.g., Vernor v. Elvies*, 6 Dict. of Dec. 4788 (1610); *see also* Barrett, *The Doctrine of Forum Non Conveniens*, 35 Calif.L.Rev. 380, 386-87 & n. 35 (1947). The Scottish courts recognized that the plea of *forum non competens* applied when to hear the case was not expedient for the administration of justice. In *Longworth v. Hope*, 3 Sess.Cas. (3d ser.) 1049, 1053 (1865), the court stated:

> The next question is the question of *forum non competens*. Now the plea usually thus expressed does not mean that the forum is one in which it is wholly incompetent to deal with the question. The plea has received a wide signification, and is frequently stated in reference to cases in

> which the Court may consider it more proper for the ends of justice that the parties should seek their remedy in another forum.

Id.; see Barrett, *supra,* at 387, n. 35. By the end of the nineteenth century, English courts had "accepted the doctrine of *forum non conveniens* as a means of preventing abuse of the court's process when the plaintiff's choice of forum is vexatious and works unnecessary hardship on the defendant." Barrett, *supra,* at 388.

In 1929, Paxton Blair, a Wall Street lawyer, brought the term "forum non conveniens" into American law with his article entitled, *The Doctrine of Forum Non Conveniens in Anglo-American Law. See generally,* Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law,* 29 Colum.L.Rev. 1 (1929). Although Blair found only three or four cases in which the American courts had used the term, he concluded:

> Upon an examination of the American decisions illustrative of the doctrine of *forum non conveniens,* it becomes apparent that the courts of this country have been for years applying the doctrine with such little consciousness of what they were doing as to remind one of Moliér's M. Jourdain, who found he had been speaking prose all his life without knowing it.

Id. at 21-22. Blair cited hundreds of cases dismissing suits for the same reasons now employed under the doctrine of forum non conveniens. *Id.* Following the publication of Blair's article, the United States Supreme Court applied the doctrine to suits in admiralty brought between aliens, *Charter Shipping Co. v. Bowring, Jones, & Tidy, Ltd.,* 281 U.S. 515, 517, 50 S.Ct. 400, 401, 74 L.Ed. 1008 (1930); *Canada Malting Co. v. Paterson S.S., Ltd.,* 285 U.S. 413, 422, 52 S.Ct.

413, 415, 76 L.Ed. 837 (1932); to cases involving the internal affairs of corporations, *Rogers v. Guaranty Trust Co.*, 288 U.S. 123, 130, 131, 53 S.Ct. 295, 297, 298, 77 L.Ed. 652 (1933); and to federal suits involving a state's system for regulating the oil industry, *Railroad Comm'n v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 584, 60 S.Ct. 1021, 1025, 84 L.Ed. 1368 (1940). *See* Barrett, *supra*, at 395-96. By 1941, "the familiar doctrine of 'forum non conveniens' . . . [was] firmly imbedded in our law." *Baltimore & O.R.R. v. Kepner*, 314 U.S. 44, 55-56, 62 S.Ct. 6, 11-12, 86 L.Ed. 28 (1941) (Frankfurter, J., dissenting).

Texas courts applied the doctrine of forum non conveniens in several cases prior to the enactment of article 4678 in 1913. In 1890, this court in dicta recognized the power of a court to refuse to exercise jurisdiction on grounds essentially the same as those of forum non conveniens. *See Morris v. Missouri Pac. Ry.*, 78 Tex. 17, 21, 14 S.W. 228, 230 (1890). In *Morris*, we stated:

> We do not think the facts alleged show the action to be transitory. But, if so, it has been held in such actions, where the parties were non-residents and the cause of action originated beyond the limits of the state, these facts would justify the court in refusing to entertain jurisdiction. *Railway Co. v. Miller*, 19 Mich. 305. Jurisdiction is entertained in such cases only upon principles of comity, and not as a matter of right. Gardner v. Thomas, 14 Johns. 136; Wells, Juris. § 115.

Id. In *Mexican National Railroad v. Jackson*, 89 Tex. 107, 33 S.W. 857 (1896), this court discussed both the dissimilarity doctrine and the potentiality of docket backlog. With regard to the latter, we stated:

> If our courts assume to adjust the rights of parties against those railroads, growing out of such facts as in this case, we will offer an invitation to all such persons who might prefer to resort to tribunals in which the rules of procedure are more certainly fixed, and the trial by jury secured, to seek the courts of this state to enforce their claims. Thus we would add to the already overburdened condition of our dockets in all the courts, and thereby make the settlement of rights originating outside the state, under the laws of a different government, a charge upon our own people.

Id., 89 Tex. at 112, 33 S.W. at 862. Finally, we made a statement closely resembling a current argument for forum non conveniens:

> If the facts showed that this [suit] was necessary in order to secure justice, and the laws were such as we could properly enforce, this consideration [docket backlog] would have but little weight; but we feel that it is entitled to be considered *where the plaintiff chooses this jurisdiction as a matter of convenience, and not of necessity.*

Id. (emphasis added).

In *Southern Pacific Co. v. Graham*, 12 Tex.Civ.App. 565, 34 S.W. 135 (1896, writ ref'd), the court stated that a district court could, in the exercise of its sound discretion, refuse to entertain jurisdiction in a case involving foreign parties. In *Missouri, Kansas & Texas Railway v. Godair Commission Co.*, 39 Tex.Civ.App. 298, 87 S.W. 871 (1905, writ ref'd), the court stated:

> Appellant's first proposition . . . is . . . that all parties being nonresidents, and the injuries complained of having occurred outside of the state of Texas, the courts of this state are not bound to entertain jurisdiction. The language of

> this proposition implies that the state courts may entertain jurisdiction of causes in which all parties are nonresidents when the injuries complained of occurred outside of the state, though they are not bound to do so. This being true, the court in this case having entertained jurisdiction, and thus [having] determined the question of public policy in favor of entertaining jurisdiction, the appellant has no right to complain.

Id. 39 Tex.Civ.App. at 301; 87 S.W. at 872. Thus, although Justice Gonzalez is correct that the first reported case using the term "forum non conveniens" is *Garrett v. Phillips Petroleum Co.*, 218 S.W.2d 238, 239 (Tex.Civ.App. – Amarillo 1949, writ dism'd), the doctrine itself was effectively established in Texas before the enactment of article 4678 by the legislature in 1913.

II.

We therefore must determine whether the legislature in 1913 statutorily abolished the doctrine of forum non conveniens in suits brought under article 4678 [now section 71.031].

Our interpretation of section 71.031 is controlled by this court's refusal of writ of error in *Allen v. Bass*, 47 S.W.2d 426 (Tex.Civ.App. – El Paso 1932, writ ref'd). In *Allen* the court of civil appeals held that old article 4678 conferred an absolute right to maintain a properly brought suit in Texas courts. The suit in *Allen* involved a New Mexico plaintiff and defendant arising out of an accident occurring in New Mexico. The court of appeals reversed a dismissal granted by the trial court on grounds similar to those of forum non conveniens, holding that "article 4678 opens the courts of this state to

citizens of a neighboring state and gives to them an *absolute right* to maintain a transitory action of the present nature and to try their cases in the courts of this state." *Id.* at 427 (emphasis added).

The El Paso Court of Civil Appeals clearly addressed and rejected the doctrine of forum non conveniens in *Allen*. Discussing the existence of the doctrine prior to the 1913 and 1917 enactments of article 4678, the court stated:

> Under the many authorities we have reviewed, both state and federal, we think it might be said that the courts of this state *had* a discretion in the matter of exercising jurisdiction where all parties were nonresidents of the state, and the cause of action arose in the state of the nonresidents.

Id. at 426 (emphasis added). Although the court did not specify the authorities it reviewed, it is clear from the Application for Writ of Error filed in this court that the Court of Civil Appeals reviewed two pre-1913 forum non conveniens cases – *Morris v. Missouri Pacific Railway, supra,* and *Southern Pacific Co. v. Graham, supra. See* Application for Writ of Error, *Bass v. Allen,* App. No. 18857 (filed April 7, 1932), at 2. The petitioner before this court in *Allen* summarized the case as follows:

> Before the passage of any statute in Texas[,] trial courts had the discretion to refuse to entertain jurisdiction of a case founded on tort committed in another State by and on residents of the State in which the tort was committed.
>
> Morris v. Ry. Co., supra.
>
> Bowman v. Flint, supra.
>
> In the case of *Southern Pacific v. Graham* the opinion reads in part as follows:

> 'Had the District Court in the exercise of a sound discretion, refused to entertain jurisdiction of the case at all, this court would not have felt called upon to review its action.'
>
> The Court of Civil Appeals in the instant case [*Allen*] held that to be true but under Article 4678 this discretion no longer existed and that it was now obligatory on the district courts to accept jurisdiction and try these cases.

Id. at 2-3. The petitioner in *Allen* argued that the Court of Civil Appeals erred in construing the term "foreign state" in article 4678 to include a state of the union. *Id.* at 4. The petitioner in *Allen* also argued that the Court of Civil Appeals erred in applying forum non conveniens to a cause of action arising in another state in the union:

> While it is perhaps just and right to open our courts for the trial of causes arising in foreign countries where the denial of a forum might mean the denial of his remedial rights, still no such just demand could be made by residents of sister States against a resident of his own State for a cause which can with more ease and economy and justice be tried in that forum.

Id. at 4. Asking that this court reverse the decision of the Court of Civil Appeals and affirm the judgment of the trial court dismissing the action, the petitioners in *Allen* quoted from *Atchison, T. & S.F. Ry. Co. v. Weeks*, 254 F. 513 (5th Cir.1918). *Id.* at 5. In *Weeks*, the United States Court of Appeals for the Fifth Circuit discussed several of the same rationales given today for the application of the doctrine of forum non conveniens:

> Manifestly, there are many advantages in trying such a case where the cause of action arises. The law of the cause of action is the law of the place.

> It may be assumed that the courts of the state can more satisfactorily administer the laws of the state than can the courts of any other state. The expense incident to a trial would usually be materially less at the place of the tort than elsewhere. The imposition upon a state of the expense of maintaining courts to try causes in which the state has no interest would be difficult to justify. The maintenance of the judicial machinery involves no light burden. Many of the states, including Texas, have been unable to provide adequate machinery. No good reason could probably be made to appear why her overworked courts should be compelled to carry any part of the burdens of other states.

Id. at 518, *cited in*, Application for Writ of Error, *Bass v. Allen*, *supra*, at 5. Given these arguments and authorities, this court chose to refuse the Application for Writ of Error, thereby manifesting its approval of the decision of the Court of Civil Appeals in *Allen v. Bass*. *Cf.*, *Hamilton v. Empire Gas & Fuel Co.*, 134 Tex. 377, 383-84, 110 S.W.2d 561, 565-66 (Tex.Comm'n App.1937, opinion adopted).

We conclude that the legislature has statutorily abolished the doctrine of forum non conveniens in suits brought under section 71.031. Accordingly, we affirm the judgment of the court of appeals, remanding the cause to the trial court for further proceedings.

HIGHTOWER and DOGGETT, JJ., file concurring opinions.

PHILLIPS, C.J., and GONZALEZ, COOK and HECHT, JJ., file dissenting opinions.

HIGHTOWER, Justice, concurring.

Because my dissenting brethren are so enthusiastic in their praise of the doctrine of *forum non conveniens*, I must add a few lines of concurrence with the majority opinion. Although I would like to join the chorus singing the praises of the doctrine of *forum non conveniens*, I am unable to do so because the Texas legislature statutorily abolished the doctrine of *forum non conveniens* when it enacted the predecessors of section 71.031. TEX.CIV.PRAC. & REM.CODE ANN. § 71.031 (Vernon 1986).

The evolution of the common law has been accomplished by good judgment and common sense filling in the pages left blank by legislative bodies. Great legal minds have masterfully developed concepts that have contributed to the strength of our civilization. Although the common law doctrine of *forum non conveniens* has been defined in recent history, the idea is a useful tool of judicial administration in those jurisdictions that have chosen to adopt it. As the dissenting opinions point out, Texas is in a distinct minority of jurisdictions that have taken a different track.

The fact that this court has waited so long to write on the doctrine is not important. Although several opportunities have been presented, the court based its decisions on other issues. In the case at hand, the doctrine is squarely before the court. The issue for this court, however, is not whether the doctrine is a good, fair, and desirable one for the people of Texas; the issue is whether the doctrine is available because of legislative actions that have been taken.

The argument is made that section 71.031 is in fact permissive, not mandatory. In the court of appeals, the petitioners argued "that the use of the words *'may be enforced'* indicates that the legislature recognized the trial court's discretionary power to dismiss." 751 S.W.2d at 210 (emphasis in original). I believe that this is an incorrect interpretation of "may be enforced." In enacting section 71.031, the legislature stated that under certain circumstances, "[a]n action for damages for the death or personal injury . . . may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country. . . . " In other words, subject to certain limitations, causes of action for death or personal injuries are enforceable in Texas. Since the legislature has opened the courts to certain plaintiffs in certain cases by statutory enactment, this court should not interfere by attempting to "rewrite" the statute.

The Texas legislature may not have intended to make Texas "the world's forum of final resort." However, the wording of section 71.031 is clear and we must respect what the legislature has done. If the legislature did not intend to statutorily preclude the adoption of the doctrine of *forum non conveniens*, however it may have been defined in 1913 when it enacted the predecessors of section 71.031. I encourage the legislature to amend section 71.031 to clarify its intent. Otherwise, the legislature's failure to act will evidence its adoption of our interpretation that the enactment of the predecessors of section 71.031 statutorily abolished the doctrine of *forum non conveniens*. *See Allen Sales and Servicenter, Inc. v. Ryan*, 525 S.W.2d 863, 866 (Tex. 1975).

The legislature has the privilege of changing its mind. Certainly it has done so many times since 1913. In writing the constitution, the founding fathers wisely provided for regular sessions of the legislature. What one legislature enacts another may later repeal. The court must respect the enactment when it is within the powers granted to the legislature by the constitution.

DOGGETT, Justice concurring.

Because its analysis and reasoning are correct I join in the majority opinion without reservation. I write separately, however, to respond to the dissenters who mask their inability to agree among themselves with competing rhetoric.[1] In their zeal to implement their own preferred social policy that Texas corporations not be held responsible at home for harm caused abroad, these dissenters

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[1] It is neither I nor the majority who find it necessary to have opinions or statues "twisted." Gonzalez dissent, 786 S.W.2d 692. Today's majority merely reconfirms the action of the legislature in abolishing the doctrine of *forum non conveniens*. I do agree with Justice Gonzalez that "sweeping implementations of social welfare policy" are sought here – not by my concurrence but in the unswerving determination of the dissenters to protect the welfare of multinational corporations.

Not content to follow the law as it is, the dissenters create gloomy pictures of Texas without forum non conveniens. However, the public policy reasons they advance to circumvent the legislature's intent are invalid. Justice Hecht then challenges the majority to state the advantages of abolishing forum non conveniens and justify its holding on the grounds of public policy. When I do so, Justice Gonzalez, in apparent disagreement with Justice Hecht, complains at my acceptance of the Hecht challenge.

refuse to be restrained by either express statutory language or the compelling precedent, previously approved by this very court, holding that forum non conveniens does not apply in Texas. To accomplish the desired social engineering, they must invoke yet another legal fiction with a fancy name to shield alleged wrongdoers, the so-called doctrine of *forum non conveniens*. The refusal of a Texas corporation to confront a Texas judge and jury is to be labelled "inconvenient" when what is really involved is not convenience but connivance to avoid corporate accountability.

The dissenters are insistent that a jury of Texans be denied the opportunity to evaluate the conduct of a Texas corporation concerning decisions it made in Texas because the only ones allegedly hurt are foreigners. Fortunately Texans are not so provincial and narrow-minded as these dissenters presume. Our citizenry recognizes that a wrong does not fade away because its immediate consequences are first felt far away rather than close to home. Never have we been required to forfeit our membership in the human race in order to maintain our proud heritage as citizens of Texas.

The dissenters argue that it is *inconvenient* and *unfair* for farmworkers allegedly suffering permanent physical and mental injuries, including irreversible sterility, to seek redress by suing a multinational corporation in a court three blocks away from its world headquarters and another corporation, which operates in Texas this country's largest chemical plant. Because the "doctrine" they advocate has nothing to do with fairness and convenience

and everything to do with immunizing multinational corporations from accountability for their alleged torts causing injury abroad, I write separately.

I. THE FACTS

Respondents claim that while working on a banana plantation in Costa Rica for Standard Fruit Company, an American subsidiary of Dole Fresh Fruit Company, headquartered in Boca Raton, Florida, they were required to handle dibromochloropropane ["DBCP"], a pesticide allegedly manufactured and furnished to Standard Fruit by Shell Oil Company ["Shell"] and Dow Chemical Company ["Dow"]. The Environmental Protection Agency issued a notice of intent to cancel all food uses of DBCP on September 22, 1977. 42 Fed.Reg. 48026 (1977). If followed with an order suspending registrations of pesticides containing DBCP on November 3, 1977. 42 Fed.Reg. 57543 (1977). Before and after the E.P.A.'s ban of DBCP in the United States Shell and Dow apparently shipped several hundred thousand gallons of the pesticide to Costa Rica for use by Standard Fruit. The Respondents, Domingo Castro Alfaro and other plantation workers, filed suit in a state district court in Houston, Texas, alleging that their handling of DBCP caused them serious personal injuries for which Shell and Dow were liable under the theories of products liability, strict liability and breach of warranty.

Rejecting an initial contest to its authority by Shell and Dow, the trial court found that it had jurisdiction under Tex.Civ.Prac. & Rem.Code Ann. § 71.031 (Vernon 1986), but dismissed the cause on the grounds of forum

non conveniens. The court of appeals reversed and remanded, holding that Section 71.031 provides a foreign plaintiff with an absolute right to maintain a death or personal injury cause of action in Texas without being subject to forum non conveniens dismissal. 751 S.W.2d 208. Shell and Dow have asked this court to reverse the judgment of the court of appeals and affirm the trial court's dismissal.

Shell Oil Company is a multinational corporation with its world headquarters in Houston, Texas. Dow Chemical Company, though headquartered in Midland, Michigan, conducts extensive operations from its Dow Chemical USA building located in Houston. Dow operates this country's largest chemical manufacturing plant within 60 miles of Houston in Freeport, Texas. The district court where this lawsuit was filed is three blocks away from Shell's world headquarters, One Shell Plaza in downtown Houston.

Shell has stipulated that all of its more than 100,000 documents relating to DBCP are located or will be produced in Houston. Shell's medical and scientific witnesses are in Houston. The majority of Dow's documents and witnesses are located in Michigan, which is far closer to Houston (both in terms of geography and communications linkages) than to Costa Rica. The respondents have agreed to be available in Houston for independent medical examinations, for depositions and for trial. Most of the respondents' treating doctors and co-workers have agreed to testify in Houston. Conversely, Shell and Dow have purportedly refused to make their witnesses available in Costa Rica.

The banana plantation workers allegedly injured by DBCP were employed by an American company on American-owned land and grew Dole bananas for export solely to American tables. The chemical allegedly rendering the workers sterile was researched formulated, tested, manufactured, labeled and shipped by an American company in the United States to another American company. The decision to manufacture DBCP for distribution and use in the third world was made by these two American companies in their corporate offices in the Unites States. Yet now Shell and Dow argue that the one part of this equation that should not be American is the consequences of their actions.

II. FORUM NON CONVENIENS – "A COMMON LAW DOCTRINE OUT OF CONTROL"[2]

As a reading of Tex.Civ.Prac. & Rem.Code Ann. § 71.031 (Vernon 1986) makes clear, the doctrine of forum non conveniens has been statutorily abolished in Texas. The decision in *Allen v. Bass*, 47 S.W.2d 426 (Tex.Civ.App. – El Paso 1932, writ ref'd), approved by this court, clearly holds that, upon a showing of personal jurisdiction over a defendant, article 4678, now section 71.031 of the Texas Civil Practice & Remedies Code, "opens the courts of this state to citizens of a neighboring state and gives them an absolute right to maintain a transitory action of the present nature and to try their cases in the courts of this state." *Id.* at 427.

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[2] Stewart *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 Cal.L.Rev. 1259, 1264 n. 18 (1986).

Displeased that *Allen* stands in the way of immunizing multinational corporations from suits seeking redress for their torts causing injury abroad, the dissenters doggedly attempt to circumvent this precedent.[3] Unsuccessful with arguments based upon Texas law, they criticize the court for not justifying its result on public policy grounds.

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[3] Justice Hecht argues that *Allen* is not controlling because it has not been subsequently followed. After citing the decisions of this court in *Couch v. Chevron Int'l Co.*, 682 S.W.2d 534, 535 (Tex.1984) and *Flaiz v. Moore*, 359 S.W.2d 872, 876 (Tex.1962), he adopts a strange new reading of opinions, stating that "*Couch* and *Flaiz* unmistakably disapproved of *Allen v. Bass* without even bothering to cite it." Hecht dissent, 786 S.W.2d 706. In Texas, we have not subscribed to the theory that opinions may be overruled without even informing anyone of such action. The doctrine of stare decisis is not usually discarded in such a cavalier manner through rejection of long-standing precedent by mere implication. Nothing said by the court in *Couch* is at all inconsistent with *Allen*. Rather, due to the appellate rules requiring preservation of error, this court never reached the issue of forum non conveniens in *Couch*. *See Couch*, 682 S.W.2d at 535.

Justice Gonzalez disregards *Allen* principally by reliance upon *Flaiz v. Moore*, 359 S.W.2d 872 (Tex.1962). This court did not reach the issue of forum non conveniens in *Flaiz;*

> It should be pointed out that we have not considered or attempted to decide in this case: (1) the extent to which the forum non conveniens principle is recognized in Texas; (2) whether article 4678 is mandatory and deprives the court of any discretion. . . .

359 S.W.2d at 876. Neither *Couch* nor *Flaiz* casts doubt upon the holding in *Allen*.

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A. USING THE "DOCTRINE" TO KILL THE LITIGATION ALTOGETHER

Both as a matter of law and of public policy, the doctrine of forum non conveniens is without justification. The proffered foundations for it are "considerations of fundamental fairness and sensible and effective judicial administration." Hecht dissent, 786 S.W.2d 703 (*quoting Adkins v. Chicago, R.I. & Pac. R.R.*, 54 Ill.2d 511, 301 N.E.2d 729, 730 (1973)). In fact, the doctrine is favored by multinational defendants[4] because a forum non conveniens

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Justice Gonzalez next attempts to distinguish *Allen* by arguing that the only doctrine it involved was that of comity, not forum non conveniens. A review of *Allen* and the subsequently refused application for writ of error indicates that the issue of forum non conveniens was presented and rejected. Even more ironic is the fact that Justice Gonzalez includes comity as one of this forum non conveniens public interest factors. *See Gonzalez* dissent, 786 S.W.2d 690.

[4] In an apparent attempt to gain access to favorable federal forum non conveniens rules and to avoid Texas procedural law, Shell and Dow removed this case to the United States District Court for the Southern District of Texas despite the clear absence of any basis for federal jurisdiction. United States District Judge DeAnda, in remanding the case, labeled Shell and Dow's efforts to distinguish plainly controlling authority against removal "specious."

Over three years after the plaintiffs filed this lawsuit in Houston, Shell and Dow obtained a dismissal of the action of forum non conveniens grounds. Extensive discovery had already been completed, interrogatories had already been answered by the individual plaintiffs and the individual plaintiffs had already agreed to appear in Houston for medical examinations and depositions. Many of the so-called "convenience" problems had already been resolved in this litigation prior to the dismissal under forum non conveniens.

dismissal is often outcome-determinative, effectively defeating the claim and denying the plaintiff recovery. The contorted result of the doctrine of forum non conveniens is to force foreign plaintiffs "to convince the court that it is more convenient to sue in the United States, while the American defendant argues that . . . [the foreign court] is the more convenient forum." Note *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond "Reyno"*, 64 Texas L.Rev. 193, 215, nn. 144-46 (1985).

A forum non conveniens dismissal is often, in reality, a complete victory for the defendant. As noted in *Irish Nat'l Ins. Co. v. Aer Lingus Teoranta*, 739 F.2d 90, 91 (2d Cir.1984),

> [i]n some instances, . . . invocation of the doctrine will send the case to a jurisdiction which has imposed such severe monetary limitations on recovery as to eliminate the likelihood that the case will be tried. When it is obvious that this will occur, discussion of convenience of witnesses takes on a Kafkaesque quality – everyone knows that no witnesses ever will be called to testify.

In using the term *forum non conveniens*, "the courts have taken refuge in a euphemistic vocabulary, one that glosses over the harsh fact that such dismissal is outcome-determination in a high percentage of the *forum non conveniens* cases. . . . " Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 L.Q.Rev. 398, 409 (1987). Empirical data available demonstrate that less than four percent of cases dismissed under the doctrine of forum non conveniens ever reaches trial in

a foreign court.[5] A forum non conveniens dismissal usually will end the litigation altogether, effectively excusing any liability of the defendant. The plaintiffs leave the courtroom without having had their case resolved on the merits.[6]

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[5] Professor David Robertson of the University of Texas School of Law attempted to discover the subsequent history of each reported transnational case dismissed under forum non conveniens from *Gulf Oil v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947) to the end of 1984. Data was received on 55 personal injury cases and 30 commercial cases. Of the 55 personal injury cases, only one was actually tried in a foreign court. Only two of the 30 commercial cases reached trial. *See Robertson, supra*, at 419.

[6] Such a result in the name of "convenience" would undoubtedly follow a dismissal under forum non conveniens in the case at bar.

The plaintiffs, who earn approximately one dollar per hour working at the banana plantation, clearly cannot compete financially with Shell and Dow in carrying on the litigation. More importantly, the cost of just one trip to Houston to review the documents produced by Shell would exceed the estimated maximum possible recovery in Costa Rica. In an unchallenged affidavit, a senior Costa Rican labor judge stated that the *maximum* possible recovery in Costa Rica would approximate 100,000 colonies, just over $1,080 at current exchange rates. Assuming such a recovery were possible, no lawyer, in Costa Rica or elsewhere, could afford to take such a case – against two giant corporations vigilantly defending themselves in litigation. Further, Costa Rica permits neither jury trials nor depositions of nonparty witnesses. Attempting to depose a Dow representative concerning the company's knowledge of DBCP hazards will prove to be an impossible task as Dow is not required to produce that person in Costa Rica.

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B. THE *GULF OIL* FACTORS – BALANCED TOWARD THE DEFENDANT

Courts today usually apply forum non conveniens by use of the factors set forth at length in *Gulf Oil Corp v. Gilbert*, 330 U.S. 501, 508-09, 67 S.Ct. 839, 843-44, 91 L.Ed. 1055 (1947). Briefly summarized, those factors are (i) the private interests of the litigants (ease and cost of access to documents and witnesses); and (ii) the public interest factors (the interest of the forum state, the burden on the courts, and notions of judicial comity). In the forty-three years in which the courts have grappled with the *Gulf Oil* factors, it has become increasingly apparent that their application fails to promote fairness and convenience. Instead, these factors have been used by defendants to achieve objectives violative of public policy.

1. The Obsolete Private Interest Factors

In their discussion of the private interest factors supposedly designed to promote convenience and fairness, the dissenters choose to avoid entire bodies of law concerning jurisdiction and venue. The dissenters ignore 154 years of Texas venue law designed to give defendants the privilege of being sued in their home country. *See Langley, A Suggested Revision of the Texas Venue Statute*, 30

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It is not unlikely that Shell and Dow seek a forum non conveniens dismissal not in pursuit of fairness and convenience, but rather as a shield against the litigation itself. If successful, Shell and Dow, like many American multinational corporations before them, would have secured a largely impenetrable shield against meaningful lawsuits for their alleged torts causing injury abroad.

Tex.L.Rev. 547, 547 (1952). Texas has generated more case law concerning venue than the other forty-nine states combined and has recently enacted a new venue statute. *See Note, Venue Procedure in Texas: An Analysis of the 1983 Amendments to the Rules of Civil Procedure Governing Venue Practice Under the New Venue Statute,* 36 Baylor L.Rev. 241, 242 n.13, 253 (1984). It is ironic that defendants for years have sought to preserve a right to be sued in a home country, yet Shell nevertheless argues that when it is sued in its hometown, the legal fiction of forum non conveniens is needed to ensure *convenience* and *fairness*.

In his dissent, Justice Gonzales correctly crystalizes [sic] the private interest factors as "those considerations that make the trial of a case relatively easy, expeditious, and inexpensive for the parties." 786 S.W.2d 695. Advances in transportation and communications technology have rendered the private factors largely irrelevant:

> A forum is not necessarily inconvenient because of its distance from pertinent parties or places if it is readily accessible in a few hours of air travel. It will often be quicker and less expensive to transfer a witness or a document than to transfer a lawsuit. Jet travel and satellite communications have significantly altered the meaning of "non conveniens."

Calavo Growers of California v. Belgium, 632 F.2d 963, 969 (2d Cir.1980) (Newman J., concurring). *See also McGee v. International Life Ins. Co.,* 355 U.S. 220, 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223 (1957) ("[M]odern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."). One judge asked whether "the entire doctrine of *forum non conveniens* should not be

reexamined in the light of the transportation revolution that has occurred since [*Gulf Oil*]." *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 456 (2d Cir.1975) (Oakes, J., dissenting), *cert. denied*, 423 U.S. 1052, 96 S.Ct. 781, 46 L.Ed.2d 641 (1976). Even Justice Hecht, in his dissent, recognizes that these factors have been rendered largely obsolete: "Ease of travel and communication, availability of evidence by videotape and facsimile transmission, and other technological advances have reduced the significance of some private inconvenience factors." 786 S.W.2d 708.[7] In sum, the private factors are no longer a predominant consideration – fairness and convenience to the parties have been thrust out of the forum non conveniens equation. As the "doctrine" is now applied, the term "forum non conveniens" has clearly become a misnomer.

2. The Public Interest Factors

The three public interest factors asserted by Justice Gonzalez may be summarized as (1) whether the interests of the jurisdiction are sufficient to justify entertaining the lawsuit; (2) the potential for docket backlog; and (3) judicial comity.

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[7] It is interesting that Justice Hecht pronounces the doctrine as one founded in considerations of "fundamental fairness," only to later reject the private factors – the doctrine's only focus or fairness to the parties. Nevertheless, he clings to the so-called doctrine of convenience, claiming that "[t]he public factors, however, deserve the same consideration now as when *Gulf Oil* was written." 786 S.W.2d 708.

a. *The Interest of Texas*

The dissenting members of the court falsely attempt to paint a picture of Texas becoming an "irresistable forum for all mass disaster lawsuits," Gonzalez dissent, 786 S.W.2d 690, and for "personal injury cases from around the world", Hecht dissent, 786 S.W.2d 707. They suggest that our citizens will be forced to hear cases in which "[t]he interest of Texas in these disputes is likely to be . . . slight," Cook dissent, 786 S.W.2d 697. Although these suppositions undoubtedly will serve to stir public debate, they have little basis in fact.

The dissenting justices each know that for a Texas jury to hear a case, Texas must obtain *in personam jurisdiction* over the defendants in question. *See Gulf Oil*, 330 U.S. at 504, 67 S.Ct. at 841 ("[T]he doctrine of *forum non conveniens* can never apply if there is an absence of jurisdiction or mistake of venue."). As Justice Cook correctly notes, a state's power to assert its jurisdiction is limited by the due process clause of the United States Constitution. In *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed.95 (1945), the United States Supreme Court held that a state may exercise in personam jurisdiction only when a defendant has "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Id.* (*quoting Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 342, 85 L.Ed. 278 (1940)). Under *Schlobohm v. Schapiro*, 784 S.W.2d 355 (Tex.1990), a defendant must have sufficient contacts with Texas in each lawsuit such that the assertion of jurisdiction comports with fair play and substantial justice.

Due process mandates that these requirements be satisfied before a Texas court may assert jurisdiction over a defendant. The personal jurisdiction-due process analysis will ensure that Texas has a sufficient interest in each case entertained in our state's courts.[8]

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[8] Justice Cook seems to suggest that it may violate due process for Shell to be sued in Houston. It is an extremely novel holding, unprecedented in American constitutional law, that a corporation could be denied due process by being sued in its hometown. Justice Cook argues in his dissent that "the due process test has not developed answers . . . to questions regarding considerations of fairness." He claims that forum non conveniens has "bridged the gap in the development of the due process test," and concludes that "the majority shatters that bridge." 786 S.W.2d 702. Justice Cook is wrong on both counts. The due process test in personal jurisdiction cases, although admittedly complex, is developing fully and quickly. Since 1977, the Supreme Court has decided eleven major personal jurisdiction cases. See e.g., Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985); *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984); *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984); *Insurance Corp. of Ireland v. Campagnie des Bauxites de Guinee*, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982); *Rush v. Savchuk*, 444 U.S. 320, 100 S.Ct. 571, 62 L.Ed.2d 516 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980); *Kulko v. Superior Court*, 436 U.S. 84, 98 (S.Ct. 1690, 56 L.Ed.2d 132 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977).

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Specifically, Texas has a substantial interest in the case at bar. As stated previously, this suit has been filed

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Justice Cook confuses two distinct issues in suggesting that forum non conveniens should be used to "bridge the gap" in the development of the due process test. Forum non conveniens is never considered until and unless the personal jurisdiction-due process determination is complete. *See Gulf Oil*, 330 U.S. at 504, 67 S.Ct. at 841. Justice Cook's backward reasoning illustrates a significant problem with relying on the doctrine of forum non conveniens, explained by one commentator as follows:

> Issues going to the existence of jurisdiction are conceptualised as turning on rules and principles which, however flexible and open-textured, lend an element of solidity that is wholly lacking for discretionary decisions to decline to exercise jurisdiction. . . .
>
> When judges have too much discretion-declining jurisdiction, they will inevitably not put in the hard work necessary to formulate and apply sensible jurisdictional rules. What has happened in American jurisprudence is a form of "buck passing" whereby the vague and amorphous "*forum non conveniens* doctrine has come to accomodate [sic] the collective shortcomings and excesses of modern rules governing jurisdiction, venue, and choice of law."

Robertson, *supra*, 103 L.Q.Rev. at 424 (citations omitted). The use of the "doctrine" in other jurisdictions has produced an incoherent and disordered body of case law as judges often have ignored the law concerning in personam jurisdiction in favor of the unbridled discretion they enjoy in dismissing cases under forum non conveniens. *See Stein, Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U.Pa.L.Rev. 781, 785 (1985) (forum non conveniens has resulted in "a crazy quilt of ad hoc, capricious, and inconsistent decisions."). *See*

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against Shell, a corporation with its world headquarters in *Texas*, doing extensive business in *Texas* and manufacturing chemicals in *Texas*. The suit arose out of alleged acts occurring in *Texas* and alleged decisions made in *Texas*. The suit also has been filed against Dow, a corporation with its headquarters in Michigan, but apparently having substantial contacts with *Texas*. Dow operates the country's largest chemical plant in *Texas*, manufacturing chemicals within sixty miles of the largest population center in *Texas*, where millions of *Texans* reside. Shell and Dow cannot now seek to avoid the *Texas* civil justice system and a jury of *Texans*.

b. Docket Backlog

The next justification offered by the dissenters for invoking the legal fiction of "inconvenience" is that judges will be overworked. Not only will foreigners take our jobs, as we are told in the popular press; now they will have our courts. The xenophobic suggestion that foreigners will take over our courts "forcing our residents

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also Stewart, *Forum Non Conveniens*: A *Doctrine in Search of A Role*, 74 Cal.L.Rev. 1259, 1324 (1986) (arguing that forum non conveniens should be abolished because "[t]he factors and policies to which the doctrine calls the court's attention . . . are best considered in the jurisdictional contexts"). The "considerations of fairness" discussed by Justice Cook may best be achieved "by following the jurisdictional rules strictly rather than construing a malleable doctrine with virtually no appellate review to negate the formal jurisdictional rules." Note, *An Economic Approach to* Forum Non Conveniens *Dismissals Requested by U.S. Multinational Corporations*, 22 Geo.Wash.J.Int'l L. & Econ. 215, 216 n. 11 (1988) [hereinafter *"Economic Approach"*].

to wait in the corridors of our courthouses while foreign causes of action are tried," Gonzalez dissent, 786 S.W.2d at 690, is both misleading and false.

It is height of deception to suggest that docket backlogs in our state's urban centers are caused by so-called "foreign litigation." This assertion is unsubstantiated empirically both in Texas and in other jurisdictions rejecting forum non conveniens.[9] Ten states, including Texas, have not recognized the doctrine. Within these states, there is no evidence that the docket congestion predicted by the dissenters has actually occurred. The best evidence, of course, comes from Texas itself. Although foreign citizens have enjoyed the statutory right to sue

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[9] Evidence from the most recent and largest national study over performed regarding the pace of litigation in urban trial courts suggests that there is no empirical basis for the dissenters' argument that Texas dockets will become clogged without forum non conveniens. The state of Massachusetts recognizes forum non conveniens. *See Minnis v. Peebles*, 24 Mass.App. 467, 510 N.E.2d 289 (1987). Conversely, the state of Louisiana has explicitly not recognized forum non conveniens since 1967. *See Kassapas v. Arkon Shipping Agency, Inc.*, 485 So.2d 565, 567 (La.App.1986), *writ denied*, 488 So.2d 203 (1986), *cert denied*, 479 U.S. 940, 107 S.Ct. 422, 93 L.Ed.2d 372 (1986), *Trahan v. Phoenix Ins. Co.*, 200 So.2d 118, 122 (La.App. 1967). Nevertheless, the study revealed the median filing-to-disposition time for tort cases in Boston to be 953 days; in New Orleans, with no forum non conveniens, the median time for the disposition of tort cases was only 405 days. The study revealed the median disposition time for contract cases in Boston to be 1580 days, as opposed to a mere 271 days in New Orleans where forum non conveniens is not used. J. Goerdt, C. Lomvardias, G. Gallas & B. Mahoney, Examining Court Delay – The Pace of Litigation in 26 Urban Trial Courts, 1987 20, 22 (1989).

defendants living or doing business here since the 1913 enactment of the predecessor to Section 71.031 of the Texas Civil Practice and Remedies Code, reaffirmed in the 1932 decision in *Allen*, Texas has not been flooded by foreign causes of action.

Moreover, the United States Supreme Court has indicated that docket congestion "is a wholly inappropriate consideration in virtually every other context." Robertson, *supra*, 103 L.Q.Rev. at 408. *See Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 344-45, 96 S.Ct. 584, 589-90, 46 L.Ed.2d 542 (1976) (remanding a case to state court because the federal court "considers itself too busy to try it" is improper). *See also United States v. Reliable Transfer Co.*, 421 U.S. 397, 408, 95 S.Ct. 1708, 1714, 44 L.Ed.2d 251 (1975) ("Congestion in the courts cannot justify a legal rule that produces unjust results in litigation. . . . "). If we begin to refuse to hear lawsuits properly filed in Texas because they are sure to require time, we set a precedent that can be employed to deny Texans access to these same courts.

Nor does forum non conveniens afford a panacea for eradicating congestion:

> Making the place of trial turn on a largely imponderable exercise of judicial discretion is extremely costly. Even the strongest proponents of the most suitable forum approach concede that it is inappropriately time-consuming and wasteful for the parties to have to "litigate in order to determine where they shall litigate." If forum non conveniens outcomes are not predictable, such litigation is bound to occur. . . . In terms of delay, expense, uncertainty, and a fundamental loss of judicial accountability, the most

> suitable forum version of forum non conveniens clearly costs more than it is worth.

Robertson, *supra*, 103 L.Q.Rev. at 414, 426.

c. Judicial Comity

Comity – deference shown to the interests of the foreign forum – is a consideration best achieved by rejecting forum non conveniens. Comity is not achieved when the United States allows its multinational corporations to adhere to a double standard when operating abroad and subsequently refuses to hold them accountable for those actions. As S. Jacob Scherr, Senior Project Attorney for the Natural Resources Defense Counsel, has noted

> There is a sense of outrage on the part of many poor countries where citizens are the most vulnerable to exports of hazardous drugs, pesticides and food products. At the 1977 meeting of the UNEP Governing Council, Dr. J.C. Kiano, the Kenyan minister for water development, warned that developing nations will no longer tolerate being used as dumping grounds for products that had not been adequately tested "and that their peoples should not be used as guinea pigs for determining the safety of chemicals."

Comment, *U.S. Exports Banned For Domestic Use, But Exported to Third World Countries*, 6 Int'l Tr.L.J. 95, 98 (1980-81) [hereinafter *"U.S. Exports Banned"*].

Comity is best achieved by "avoiding the possibility of 'incurring the wrath and distrust of the Third World as it increasingly recognizes that it is being used as the industrial world's garbage can.' " Note, *Hazardous Exports From A Human Rights Perspective*, 14 Sw.U.L.Rev. 81, 101

(1983) [hereinafter *"Hazardous Exports"*] (quoting Hon. Michael D. Barnes (Representative in Congress representing Maryland)).[10]

The factors announced in *Gulf Oil* fail to achieve fairness and convenience. The public interest factors are designed to favor dismissal and do little to promote the efficient administration of justice. It is clear that the application of forum non conveniens would produce muddled and unpredictable case law,[11] and would be used by defendants to terminate litigation before a consideration of the merits ever occurs.

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[10] A senior vice president of a United States multinational corporation acknowledged that "[t]he realization at corporate headquarters that liability for any [industrial] disaster would be decided in the U.S. courts, more than pressure from Third World governments, has forced companies to tighten safety procedures, upgrade plants, supervise maintenance more closely and educate workers and communities." WALL ST. J., Nov. 26, 1985, at 22, col. 4 (quoting Harold Corbett, senior vice president for environmental affairs at Monsanto Co.).

[11] Today's opinions reveal the legal monstrosity that would be created in Texas if forum non conveniens were applied. Justice Hecht and Justice Gonzalez each predict dire consequences of a Texas without forum non conveniens. Chief Justice Phillips correctly admits that no such predictions can be supported. The doctrine has been developing for over 100 years, yet Justice Gonzalez asserts that the doctrine "was at best incipient among the states" until 1947. Justice Hecht states that Texas is "the only jurisdiction on earth" with the position taken today; however, earlier in the same opinion, he admits that ten states in the United States have not adopted forum non conveniens.

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III. PUBLIC POLICY & THE TORT LIABILITY OF MULTINATIONAL CORPORATIONS IN UNITED STATES COURTS

The abolition of forum non conveniens will further important public policy considerations by providing a check on the conduct of multinational corporations (MNCs). *See Economic Approach*, 22 Geo.Wash.J. Int'l L. & Econ. at 241. The misconduct of even a few multinational corporations can affect untold millions around the world.[12] For example, after the United States imposed a

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Each of the dissenters strongly advocates forum non conveniens for Texas. However, they cannot arrive at a collective decision regarding its application. While Justice Hecht correctly acknowledges that the private interest factors are outdated and useless, Justice Gonzalez and Chief Justice Phillips advocate both the private and public interest factors. While Justice Gonzalez correctly notes that before the doctrine may be applied, jurisdiction must be proper, Justice Cook argues that the doctrine is needed to help bridge the gap in the jurisdictional rules. The conflicting views of the dissenters surely portend the confused and unpredictable decisions which would inevitably result from attempts by Texas trial judges to apply the doctrine.

[12] As one commentator observed, U.S. multinational corporations

> adhere to a double standard when operating abroad. The lack of stringent environmental regulations and worker safety standards abroad and the relaxed enforcement of such laws in industries using hazardous processes provide little incentive for [multinational corporations] to protect the safety of workers, to obtain liability insurance to guard against the hazard of product defects or toxic tort exposure, or

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domestic ban on the sale of cancer-producing TRIS-treated children's sleepwear, American companies exported approximately 2.4 million pieces to Africa, Asia and South America. A similar patter occurred when a ban was proposed for baby pacifiers that had been linked to choking deaths in infants. *Hazardous Exports, supra,* 14 Sw.U.L.Rev. at 82. These examples of indifference by some corporations towards children abroad are not unusual.[13]

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> to take precautions to minimize pollution to the environment. *This double standard has caused catastrophic damages to the environment and to human lives.*

Note, *Exporting Hazardous Industries: Should American Standards Apply?*, 20 Int'l L. & Pol. 777, 780-81 (1988) (emphasis added) (footnotes omitted) [hereinafter *"Exporting Hazardous Industries"*]. *See also* Diamond, *The Path of Progress Racks the Third World*, N.Y. Times, Dec. 12, 1984, at B1, col. 1.

[13] A subsidiary of Sterling Drug Company advertised Winstrol, a synthetic male hormone severely restricted in the United States since it is associated with a number of side effects that the F.D.A. has called "virtually irreversible", in a Brazilian medical journal, picturing a healthy boy and recommending the drug to combat poor appetite, fatigue and weight loss. *U.S. Exports Banned, supra,* 6 Int'l Tr.L.J. at 96. The same company is said to have marketed Dipyrone, a painkiller causing a fatal blood disease and characterized by the American Medical Association as for use only as "a last resort," as "Novaldin" in the Dominican Republic. "Novaldin" was advertised in the Dominican Republic with pictures of a child smiling about its agreeable taste. *Id.* at 97. "In 1975, thirteen children in Brazil died after coming into contact with a toxic pesticide whose use had been severely restricted in this country." *Hazardous Exports, supra,* 14 Sw.U.L.Rev. at 82.

The allegations against Shell and Dow, if proven true, would not be unique, since production of many chemicals banned for domestic use has thereafter continued for foreign marketing.[14] Professor Thomas McGarity, a respected authority in the field of environmental law, explained:

> During the mid-1970s, the United State Environmental Protection Agency (EPA) began to restrict the use of some pesticides because of their environmental effects, and the Occupational Safety and Health Administration (OSHA) established workplace exposure standards for toxic and hazardous substances in the manufacture of pesticides. . . . [I]t is clear that many pesticides that have been severely restricted in the United States are used without restriction in many Third World countries, with resulting harm to fieldworkers and the global environment.

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[14] Regarding Leptophos, a powerful and hazardous pesticide that was domestically banned, S. Jacob Scherr stated that

> In 1975 alone, Velsicol, a Texas-based corporation exported 3,092,842 pounds of Leptophos to thirty countries. Over half of that was shipped to Egypt, a country with no procedures for pesticide regulation or tolerance setting. In December 1976, the *Washington Post* reported that Leptophos use in Egypt resulted in the death of a number of farmers and illness in rural communities. . . . But despite the accumulation of data on Leptophos' severe neurotoxicity, Velsicol continued to market the product abroad for use on grain and vegetable crops while proclaiming the product's safety.

U.S. Exports Banned, 6 Int'l Tr.L.J. at 96.

McGarity, *Bhopal and the Export of Hazardous Technologies*, 20 Tex.Int'l L.J. 333, 334 (1985) (citations omitted). By 1976, "29 percent, or 161 million pounds, of all the pesticides exported by the United States were either unregistered or banned for domestic use." McWilliams, *Tom Sawyer's Apology: A Reevaluation of United States Pesticide Export Policy*, 8 Hastings Int'l & Comp.L.Rev. 61, 61 & n. 4 (1984). It is estimated that these pesticides poison 750,000 people in developing countries each year, of which 22,500 die. *Id.* at 62. Some estimates place the death toll from the "improper marketing of pesticides at 400,000 lives a year." *Id.* at 62 n. 7.

Some United States multinational corporations will undoubtedly continue to endanger human life and the environment with such activities until the economic consequences of these actions are such that it becomes unprofitable to operate in this manner. At present, the tort laws of many third world countries are not yet developed. *An Economic Approach, supra*, 22 Geo. Wash.J.Int'l L. & Econ. at 222-23. Industrialization "is occurring faster than the development of domestic infrastructures necessary to deal with the problems associated with industry." *Exporting Hazardous Industries, supra*, 20 Int'l L. & Pol. at 791. When a court dismisses a case against a United States multinational corporation, it often removes the most effective restraint on corporate misconduct. *See An Economic Approach, supra*, 22 Geo. Wash.J.Int'l L. & Econ. at 241.

The doctrine of forum non conveniens is obsolete in a world in which markets are global and in which ecologists have documented the delicate balance of all life on this planet. The parochial perspective embodied in the

doctrine of forum non conveniens enables corporations to evade legal control merely because they are transnational. This perspective ignores the reality that actions of our corporations affecting those abroad will also affect Texans. Although DBCP is banned from use within the United States, it and other similarly banned chemicals have been consumed by Texans eating foods imported from Costa Rica and elsewhere. *See* D. Weir & M. Schapiro, Circle of Poison 28-30, 77, 82-83 (1981).[15] In the absence of meaningful tort liability in the United States for their actions, some multinational corporations will continue to operate without adequate regard for the human and environmental costs of their actions. This result cannot be allowed to repeat itself for decades to come.

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[15] Less than one per cent of the imported fruits and vegetables are inspected for pesticides. General Accounting Office, *Pesticides: Better Sampling and Enforcement Needed on Imported Food* GAO/RCED-86-219 (Sept. 26, 1986), at 3. The GAO found that of the 7.3 billion pounds of bananas imported into the F.D.A.'s Dallas District (covering Texas) from countries other than Mexico in 1984, not a single sample was checked for illegal pesticide residues such as DBCP. *Id.* at 53. Even when its meager inspection program discovers illegal pesticides, the F.D.A. rarely sanctions the shipper or producer. *Id.* at 4. The GAO found only eight instances over a six year period where any punitive action whatsoever was taken. *Id.* "United States consumers have suffered as pesticide-treated crops are imported to the United States, thus completing a circle of poison." McGarity, *supra*, 20 Tex.Int'l L.J. at 334. As just one example, from 1972 to 1976 American imports of produce from Mexico contained residues of Leptophos, the neurotoxic pesticide discussed previously at note 14. *U.S. Exports Banned, supra*, 6 Int'l Tr.L.J. at 97 n. 19.

As a matter of law and of public policy, the doctrine of forum non conveniens should be abolished. Accordingly, I concur.

PHILLIPS, Chief Justice, dissenting.

I respectfully dissent. For the reasons stated in Justice Hecht's dissenting opinion, I would hold that the doctrine of forum non conveniens is not foreclosed by TEX.CIV.PRAC. & REM.CODE § 71.031. While I agree that the statute allows these plaintiffs to bring suit in Texas, I cannot agree that the statutory language prohibits the trial court from applying any common law procedural defense. Is laches, for example, statutorily foreclosed in wrongful death cases? I think not. I would therefore overrule *Allen v. Bass*, 47 S.W.2d 426 (Tex.Civ.App. – El Paso 1932, writ ref'd.).

I regret our court's decision to discard a procedural tool which has proved useful to the federal judicial system and most of our sister states. Unlike my fellow dissenters, however, I lack the prescience to foretell whether dire consequences will follow. As the existence or not of forum non conveniens has long been an open question in Texas,[1] our court have traditionally attracted a number of

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[1] As the United States Supreme Court recently observed:

> [Texas] may not apply the same, or indeed, any forum non conveniens analysis . . . Rather, as the Court of Appeals noted, it is possible that "Texas has constituted itself the world's forum of final resort, where suit for personal injury or death may always be filed if nowhere else."

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actions originating in foreign jurisdictions. Today's decision will probably accelerate the trend, but to what extent, and with what effect, I do not know. Further, in dissenting I express no intimation as to whether or not the doctrine of forum non conveniens would be appropriate under the facts of this particular case.

I would reverse that part of the judgment of the court of appeals which precludes the possibility of a forum non conveniens dismissal, affirm that part of the judgment which reverses the dismissal in this matter, and remand this cause to the trial court for a consideration of the factors set forth in *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 508-09, 67 S.Ct. 839, 843-44, 91 L.Ed. 1055 (1947), as modified to meet modern circumstances. *See generally* Note, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond "Reyno"*, 64 Texas L.Rev. 193, 214-23 (1985).[2]

GONZALEZ, Justice, dissenting.

Under the guise of statutory construction, the court today abolishes the doctrine of *forum non conveniens* in suits brought pursuant to section 71.031of the Civil Practice and Remedies Code. The decision makes us one of

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Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 144-45, 108 S.Ct. 1684, 1688-89, 100 L.Ed.2d 127, 135 (1988).

[2] The trial court dismissed this cause under forum non conveniens without written expression of what factors, if any, it had considered. In order to facilitate appellate review, I would require the trial court to set forth written findings and conclusions regarding those factors, either in the final judgment or in a separate document.

the few states in the Union without such a procedural tool,[1] and if the legislature fails to reinstate this doctrine, Texas will become an irresistible forum for all mass disaster lawsuits. *See generally*, Note, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno*, 64 Tex. L.Rev. 193 (1985). "Bhopal"-type litigation, with little or no connection to Texas will *add* to our already crowded dockets, forcing our residents to wait in the corridors of our courthouses while foreign causes of action are tried.[2] I would hold that section 71.031 of the Texas Civil Practice and Remedies Code *does not* confer upon foreign litigants an *absolute right* to bring suit in Texas. Because I believe that trial courts have the inherent power to apply *forum non conveniens* in appropriate cases, I would provide guidelines and set parameters for its use. I would thus modify the judgment of the court of appeals and remand the cause to the trial court for further proceedings.

This cause of action arose in Costa Rica where certain Costa Rican agricultural workers suffered injuries allegedly as a result of exposure to a pesticide manufactured by the defendants. The injured workers are seeking to enforce in Texas courts claims for personal injuries that occurred in Costa Rica. Several suits involving many of

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[1] *See Chambers v. Merrell-Dow Pharmaceuticals*, 35 Ohio St.3d 123, 519 N.E.2d 370, 373, n. 3 (1988).

[2] For example, in July 1988, there was an oil rig disaster in Scotland. A Texas lawyer went to Scotland, held a press conference, and wrote letter to victims of their families. He advised them that they had a good chance of trying their case in Texas where awards would be much higher than elsewhere. Houston Post, July 18, 1988, at 13A, col. 1; The Times (London), July 18, 1988, at 20A, col. 1; Texas Lawyer, Sept. 26, 1988 at 3.

the same plaintiffs and essentially the same defendants have previously been filed in the United States and then dismissed on *forum non conveniens* grounds.

In 1983, a group of plaintiffs filed suit in a Florida state court. That case was removed to a federal district court, which dismissed it on the basis of *forum non conveniens*. The dismissal was affirmed on appeal. *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215 (11th Cir.), *cert. denied*, 474 U.S. 948, 106 S.Ct. 347, 88 L.Ed.2d 294 (1985).

In 1985, members of this group of plaintiffs filed suit in California. That case was subsequently removed to a federal court, which dismissed it on the basis of *forum non conveniens* in 1986. *Aguilar v. Dow Chem. Co.*, No. 86-4753 JGD (S.D.Cal 1987).

In 1987, a federal district court in Florida once again addressed a cause of action filed by certain members of this group of plaintiffs. The court dismissed the action on the basis of *forum non conveniens*. *Barrantes Cabalceta v. Standard Fruit Co.*, 667 F.Supp. 833 (S.D.Fla.1987).

The case at bar was originally filed in state district court in Harris County, Texas in 1984. It was removed to federal court and then remanded to the district court where it was dismissed on the basis of *forum non conveniens*. The court of appeals reversed the judgment of the trial court and remanded the case for trial. It is this judgment that the court today affirms.

The term *forum non conveniens* refers to the discretionary power of a court to decline jurisdiction when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in

another forum. *Black's Law Dictionary*, 589 (5th ed, 1979). It is a sound doctrine rooted in public policy concerns of judicial economy and fairness, and it is recognized in Texas. *See, e.g., Flaiz v. Moore*, 353 S.W.2d 74 (Tex.Civ.App. – San Antonio), *rev'd on other grounds*, 359 S.W.2d 872 (Tex.1962); *see also McNutt v. Teledyne Indus., Inc.*, 693 S.W.2d 666 (Tex.App. – Dallas 1985, writ dism'd); *Van Winkle-Hooker Co. v. Rice*, 448 S.W.2d 824 (Tex.Civ.App. – Dallas 1969, no writ); *Cole v. Lee*, 435 S.W.2d 283 (Tex.Civ.App. – Dallas 1968, writ dism'd); *Forcum-Dean Co. v. Missouri Pac. R.R. Co.*, 341 S.W.2d 464 (Tex.Civ.App. – San Antonio 1960, writ dism'd). "*Forum non conveniens* is a necessary antidote to the greatly expanded jurisdiction provided by 'long-arm' statutes. . . . It is . . . a 'flexible procedure for the discretionary determination of place of trial,' . . . not a technique for leaving unpopular litigants without a court to press their claims." *Islamic Republic of Iran v. Pahlavi*, 478 N.Y.S.2d 597, 606-07, 62 N.Y.2d 474, 491, 467 N.E.2d 245, 254-55 (1984) (Meyer, J., dissenting) (citations omitted).

The court today[3] "conclude[s] that the legislature has statutorily abolished the doctrine of *forum non conveniens* in suits brought under section 71.031." 786 S.W.2d 674. I disagree, *Forum non conveniens* did not arrive upon the judicial landscape of this state until after the predecessors to section 71.031 were enacted. The statute that was to

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[3] Until today, the issue of whether the legislature or the supreme court had abolished the doctrine of *forum non conveniens* was an open question. See *Flaiz v. Moore*, 359 S.W.2d 872, 876, (Tex.1962); *Couch v. Chevron International Co., Inc.*, 682 S.W.2d 534, 535 (Tex.1984) (per curiam).

become section 71.031 was first enacted in 1913. Act of April 8, 1913, ch. 161, § 1, 1913 Tex.Gen.Laws 338, repealed by Act of May 17, 1985, ch. 959, § 9(1), 1985 Tex.Gen.Laws 3322. Before 1947, the year in which the U.S. Supreme Court endorsed the doctrine of *forum non conveniens* in *Gulf Oil v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), the discretion to dismiss a case upon the basis of the unique assemblage of considerations recognized by the doctrine was at best incipient among the states;[4] such discretion was non-existent in Texas. *See Note, Recent Cases and Statutes*, 20 Tex.L.Rev. 609, 610-612 (1942). The first reported Texas case to identify *"forum non conveniens"* was *Garrett v. Phillips Petroleum Co.*, 218 S.W.2d 238 (Tex.Civ.App. – Amarillo 1949, writ dism'd. I believe that the legislature was unacquainted with the doctrine of *forum non conveniens* and cannot be said to have abolished it.

Paxton Blair's conclusion in his article *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Colum.L.Rev. 1 (1929) that *forum non conveniens* has been employed in the state courts since 1817:

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[4] *See* Stein, *Forum Non Conveniens and the Redundancy Court Access Doctrine*, 133 U.Pa.L.R. 781, 796 (1985) [hereinafter Stein] ("Although bearing a Latin name, the forum non conveniens doctrine is of relatively recent origin. Not until 1948 was the doctrine accepted for general application in the federal courts and it received little or no attention in the state courts until after federal adoption.") *see also* Comment, *Forum Non Conveniens: The Need for Legislation in Texas*, 54 Tex.L.Rev. 737, 740 (1976).

> seems questionable. Many of the state cases cited by [Blair] involved rules that absolutely barred the action.
>
> Such provisions, unlike *forum non conveniens*, did not provide the trial courts with discretion; rather, they absolutely precluded assertion of jurisdiction. Moreover, until 1929 it was thought that the doctrine was a violation of the privileges and immunities clause of the constitution. . . .

Stein, 133 U.Pa.L.Rev. at 796 n. 43 (citations omitted); *see also* Barrett, *The Doctrine of Forum Non Conveniens*, 35 Cal.L.Rev. 380, 388-90 (1947); J. Hazard, *Civil Procedure*, § 2.31 (1985); Note, *Forum Non Conveniens in Georgia: A Critical Analysis and Proposal for Adoptions*, 7 Ga.L.Rev. 744, 747, 749, n. 15 (1973) [hereinafter *Forum Non Conveniens in Georgia*] ("After the publication of [Blair's article], the use of the phrase 'forum non conveniens' became quite familiar, but few American courts applied it. Not until the late 1940's did forum non conveniens really come of age in this country.") The court's reliance on Blair is misplaced.

The original version of section 71.031 was enacted in 1913 to give *Texas citizens* the right to maintain a cause of action in the courts of this State free from the threat of a dismissal under the dissimilarity doctrine. *See* Note, *The Texas Dissimilarity Doctrine as Applied to the Tort Law of Mexico – A Modern Evaluation*, 55 Tex.L.Rev. 1281, 1293 (1977) [hereinafter Note]; *see also* S. Bayitch & J. Siqueiros, *Conflict of Laws: Mexico and the United States* 152 (1968); Paulsen, *Foreign Law in Texas Courts*, 33 Tex.L.Rev. 437,

454 (1955); Stumberg, *Conflict of Laws-Torts-Texas Decisions*, 9 Tex.L.Rev. 21, 30 (1930). The caption to the statute and subsection 2 both evidence this intent:

> PROTECTION OF CITIZENS OF THIS STATE INJURED IN FOREIGN COUNTRIES – PROVIDES ADEQUATE COMPENSATION THEREFOR
>
> [S.B. No. 75] Chapter 161
>
> An act for the protection of *persons of this State* who may be injured in a foreign country and providing for adequate compensation therefor, and declaring an emergency.
>
> Be it enacted by the Legislature of the State of Texas:
>
> Section 1. That whenever the death or personal injury of a citizen of this State or a country having equal treaty rights with the United States on behalf of its citizens, has been or may be caused by a wrongful act, neglect or default in any State, for which a right to maintain an action and recover damages in respect thereof is given by a statute or by law of such State, territory or foreign country, such right of action may be enforced in the courts of the United States, or in the courts of this State, within the time prescribed for the commencement of such action by the statute of this State, and the law of the former shall control in the maintenance of such action in all matters pertaing [pertaining] to procedure.
>
> Section 2. The fact that there is now no law permitting *citizens of this State* who receive injuries in a foreign country from bringing an action for said injuries under the laws of this State, creates an emergency and imperative public necessity requiring that the constitutional rule that bills shall be read upon three several days,

> should be suspended and it is hereby suspended, and this Act shall take effect from and after its passage.

Act of April 8, 1913, ch. 161, § 1, 1913 Tex.Gen.Laws 338 (Repealed 1985) (emphasis added). It does not follow from the language of this version of the statute or any of the subsequent versions[5] that the legislature intended to give citizens of foreign countries an absolute right to maintain suits in Texas or to strip our courts of their

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[5] The current version, section 71.031 of the Civil Practice and Remedies code, provides:

> (a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:
>
> (1) A law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;
>
> (2) the action is begun in this state within the time provided by the laws of this state for beginning the action; and
>
> (3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.
>
> (b) All matters pertaining to procedure in the prosecution or maintenance of the action in the courts of this state are governed by the law of this state.
>
> (c) The court shall apply the rules of substantive law that are appropriate under the facts of this case.

equitable common law power to, on occasion and under certain circumstances, dismiss disputes that have only a tenuous connection to Texas.[6] Instead, the legislature was concerned with the preclusive effect of the dissimilarity doctrine upon actions brought by Texans injured in foreign countries and intended only to prohibit courts from dismissing a case solely on the grounds that the law to be applied in the case was dissimilar. *See* Note, 55 Tex.L.Rev. at 1293 (1977); *see also* Baade, *Conflict of Laws, 1974 Survey of Texas Law*, 28 Sw.L.J. 166, 216-217 (1974); Note, 2 Tex.L.Rev. 244, 246 (1924).

The doctrine of *forum non conveniens* cannot be equated to the dissimilarity doctrine. *See Flaiz*, 359 S.W.2d at 875. The legislature simply did not contemplate *forum non conveniens* when the statute was drafted. Similarly, subsequent amendments to the statute did not abrogate *forum non conveniens* dismissals. Therefore, because the purposes of the legislature in enacting and amending this statute are ascertainable, and because there is ***absolutely*** no indication that the legislature sought to abolish the doctrine, the court's assertion that the statute precludes *forum non conveniens* is indefensible. *See City of Mason v. West Texas Utilities*, 150 Tex. 18, 237 S.W.2d 273, 275, 278 (1951) ("the aim and object of construction is to ascertain and enforce the legislative intent. . . . "); *cf. Commonwealth of Massachusetts v. United North & South Development Co.*, 140 Tex. 417, 168 S.W.2d 226, 229 (1942) (interpretation by implication cannot be used to extend a statute when the

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[6] It makes no sense to argue that the legislature in 1913 abolished the doctrine of *forum non conveniens* when the doctrine was not recognized in Texas at that time.

legislative intent is discernible); *Taylor v. Firemen's and Policemen's Civil Service Commission of City of Lubbock*, 616 S.W.2d 187, 189 (Tex.1981) ("In the absence of a specific amendment, a statute should be given the meaning which it had when enacted").

The court appears to hold that this case turns upon the language in section 71.031, which states that an action "may be enforced in the courts of this State."[7] It then proceeds, however, to substitute the holding in *Allen v. Bass*, 47 S.W.2d 426 (Tex.Civ.App. – El Paso 1932, writ ref'd) wherein the court of appeals held that former article 4678 (now section 71.031) conferred an absolute right to maintain a suit in Texas courts, for an explanation of how that language precludes application of *forum non conveniens*. Yet in *Flaiz v. Moore*, 359 S.W.2d 872, 876 (Tex.1962), long after *Allen v. Bass* was decided, the Texas Supreme Court warned that it had not yet decided whether former article 4678 was mandatory such that a court could not exercise discretion in determining whether to entertain a suit having little or no connections with the State of Texas. *See also* Note, 41 Tex.L.Rev. 924,

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[7] Dow and Shell contend that the legislature's use of the word "may" makes the statute permissive. They argue that both Kansas and Iowa have statutes similar to section 71.031 that also use the word "may" and that each applies the doctrine of *forum non conveniens*. *Compare* KAN.STAT.ANN. § 60-217(b) (1986) *and Gonzales v. Atchinson, Topeka, and Santa Fe Ry. Co.*, 189 Kan. 689, 371 P.2d 193 (1962) *with* IOWA CODE § 616.8 (1939) *and Silversmith v. Kenosha Auto Transport*, 301 N.W.2d 725, 727 (Iowa 1981). The court shuns this persuasive reasoning and chooses to hold that the language "may be enforced" in section 71.031 is mandatory thus precluding *forum non conveniens* dismissals.

927 n. 19 (1963). We reiterated this warning as late as 1984 in an opinion refusing an application for writ on grounds of no reversible error: "[T]he applicability of *forum non conveniens* to an article 4678 cause of action is an open question." *Couch v. Chevron International Co., Inc.*, 682 S.W.2d 534, 535 (Tex.1984) (per curiam), *citing Flaiz v. Moore*, 359 S.W.2d 872 (Tex.1962).

In short, *Allen v. Bass* does not control the issue of *forum non conveniens* dismissals under section 71.031 because that decision did not address the doctrine of *forum non conveniens*. *See McNutt v. Teledyne Indus., Inc.*, 693 S.W.2d 666, 668 (Tex.App. – Dallas 19[illegible], writ dism'd) ("As we read *Allen*, the doctrine of *comity* was at issue, not the doctrine of *forum non conveniens*"). As stated earlier, the doctrine of *forum non conveniens* was not firmly established in American jurisdictions until the United States Supreme Court's seminal decision in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), some 15 years after *Allen v. Bass*. *See Willman v. McMillen*, 779 S.W.2d 583, 584-85 (Mo.1989); *Forum Non Conveniens in Georgia*, 7 Ga.L.Rev. at 748 n. 15 ("By 1947 only six states accepted the doctrine."); C. Wright, *Federal Courts* § 44 at p. 259 (4th ed. 1983); Stein, *supra*, fn. 4. at 796. Abrogation of the doctrine of *forum non conveniens* under section 71.031 in a case such as this cannot be reasonably predicated upon *Allen v. Bass;* the dismissal in that case, based upon the principals of comity, cannot be equated with *forum non conveniens*. Nowhere in *Allen v. Bass* is the doctrine of *forum non conveniens* discussed.

Comity considerations focus on deference to a sister state; *forum non conveniens* considerations allow the trial court to engage in a discretionary balancing of factors in

order to determine the most appropriate forum for the litigation.[8] The comity dismissal ordered by the trial court in *Allen* did not involve the balancing of the public and private interests which inform a *forum non conveniens* decision,[9] and the opinion does not reflect that the court of appeals intended to abolish the doctrine of *forum non conveniens*.[10] A rule announced in a judicial opinion may

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[8] The court cites *Morris v. Missouri Pac. R.R.*, 78 Tex. 17, 14 S.W. 228, 230 (1890) as authority for the proposition that Texas courts had recognized *forum non conveniens* long before *Gulf Oil Corp. v. Gilbert*. That decision did not involve the doctrine of *forum non conveniens*. The *Morris* court never described or engaged in a balancing of public and private interest factors. Instead, the court explained the application of the doctrine of comity and affirmed the dismissal of the case by the trial court because the facts "indicate[d] the impolicy of entertaining jurisdiction . . . upon principles of comity." *Id.* at 230. Similarly, in the cases *Mexican National Ry. Co. v. Jackson*, 89 Tex. 107, 33 S.W. 857 (1896), *Southern Pacific Co. v. Graham*, 12 Tex.Civ.App. 565, 34 S.W. 135 (1896, writ ref'd), and *Missouri, Kansas & Texas Ry. Co. of Texas v. Godair Comm'n Co.*, 87 S.W. 871 (Tex.Civ.App.1905, writ ref'd), cited by the court, none of the opinions indicate that the court engaged in the discretionary balancing of public and private interest factors that is necessary in a proper *forum non conveniens* analysis.

[9] Comity does not rely on a balancing of interest factors. Rather, it "is a willingness to grant a privilege, not as a matter of right, but out of deference and good will." Black's Law Dictionary, 5th ed. (1979). The principles of comity are not properly equated with the doctrine of *forum non conveniens*.

[10] Until now, *Allen v. Bass* has been largely ignored. Imprecise language in the opinion is, regrettably, subject to manipulation. Accordingly, I would overrule *Allen v. Bass* in order to eradicate any possible confusion concerning the application of *forum non conveniens* to actions alleged under section 71.031.

not be disassociated from or taken out of the context of its facts. *W.D. Haden & Co. v. Dodger*, 158 Tex. 74, 308 S.W.2d 838, 840 (1958). Further, the phrase – "absolute right to maintain a transitory action" – used in *Allen v. Bass*, is improvidently relied upon by the court in reaching its result today. First, that language resulted from a group of cases establishing absolute open forums in order to avoid constitutional attacks under the privileges and immunities clause. Subsequently, the Supreme Court indicated that the privileges and immunities clause is no obstacle to a state vesting discretion in its courts to refuse to hear suits between nonresidents. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504, 67 S.Ct. 839, 841, 91 L.Ed. 1055 (1947); Barrett, *The Doctrine of Forum Non Conveniens*, 35 Calif.L.Rev. 380, 393, n. 60; *cf. Broderick v. Rosner*, 294 U.S. 629, 643, 55 S.Ct. 589, 592, 79 L.Ed. 1100 (1935); *Williams v. North Carolina*, 317 U.S. 287, 294, n. 5, 63 S.Ct. 207, 211, n. 5, 87 L.Ed. 279 (1942) (under the full faith and credit clause, a state "may in appropriate cases apply the doctrine of *'forum non conveniens'* "). Second, the conclusion of the court in *Allen v. Bass* that article 4678 gives an absolute right to maintain a transitory action is dicta except with respect to citizens of other states. *Allen v. Bass* simply is not controlling as to the question of whether the legislature statutorily abolished the doctrine of *forum non conveniens* in Texas suits brought under section 71.031 by residents of foreign countries.

Forum non conveniens is a common law doctrine "pertaining to procedure." *See Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 71 S.Ct. 1, 95 L.Ed. 3 (1950). I would therefore hold that the doctrine is applicable to

cases alleged under section 71.031 by virtue of subsection (b), which provides:

> [A]ll matters *pertaining to procedure* in the prosecution or maintenance of the action in the courts of this state are governed by the laws of this state.

(emphasis added). *See* Note, 41 Tex.L.Rev. 924, 927, n. 16 (1963).

Because I believe that the doctrine of *forum non conveniens* is applicable to cases brought in the courts of this state, I would adopt the following guidelines for its use.

Forum Non Conveniens Factors

At the outset it must be noted that the doctrine of *forum non conveniens* does not come into play until it is established that the trial court has both subject matter and personal jurisdiction. If there is any challenge to the court's jurisdiction over the parties or the subject matter, it must be resolved before the court may make the *forum non conveniens* determination. Thereafter, the doctrine may be invoked only by motion of a party, and the burden shall rest upon the movant to produce evidence which would authorize dismissal. This evidence must establish by a preponderance that the court should not accept trial of the case.

Once *forum non conveniens* has been invoked, the trial court should, as its first step, determine what substantive law governs the case under the relevant choice of law rules. *See In Re McClelland Engineers, Inc.*, 742 F.2d 837 (5th Cir.1984) (the first step in a *forum non conveniens* analysis is the determination of what substantive law

governs the case). If the court concludes that a foreign law will govern the case, it may consider this as a factor weighing in favor of dismissal. *See* J. Hazard, *Civil Procedure*, § 2.31 (1985).

Next, it must be established that the plaintiff has an alternate forum – the doctrine presupposes at least two forums in which the defendant is amenable to process. *Gulf Oil*, 330 U.S. at 506-07, 67 S.Ct. at 842-43. An acceptable alternate forum does not exist when, for example, the plaintiff is unable to get personal jurisdiction of the defendant elsewhere. If no acceptable alternative exists, the case should not be dismissed regardless of the additional burdens which will be thrust upon the defendant. *See* Restatement (Second) of Conflict of Laws § 84 comment c at 251 (1969). And even if an acceptable alternate forum does exist, the trial court may not dismiss the case if the plaintiff is a resident of Texas.

Once the trial judge has determined that an acceptable alternate forum exists, the judge must then consider all relevant factors of public and private interest to determine if the interests of justice would be better served if the alternate jurisdiction adjudicated the case. Factors of private interest are those considerations that make the trial of a case relatively easy, expeditious, and inexpensive for the parties. Factors of public interest include: 1) those which take into account the burdens imposed upon the citizens of the forum state when controversies having no connection with the state are allowed to proceed to trial; 2) those which comprehend the burdens which the trial will work upon the court itself; and 3) those which recognize the general interest in having localized controversies decided in the jurisdiction in which they arose.

See generally Note, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno*, 64 Tex.L.Rev. 193, 214 (1985). No single private or public interest factor should be outcome determinative; rather, each must be considered in relation to the others.

The consideration of public and private interest factors should be individualized on a case by case basis. Clearly, the general descriptions of those factors set forth above are capable of granulation into the more specific considerations necessitated by individual cases. *See, e.g., Gulf Oil*, 330 U.S. at 508-09, 67 S.Ct. at 843-44; *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257-261, 102 S.Ct. 252, 266-269, 70 L.Ed.2d 419 (1981); *In Re Air Crash Disaster Near New Orleans, La., on July 9, 1982*, 821 F.2d 1147, 1166 (5th Cir.1987); *Pain v. United Technologies Corp.*, 637 F.2d 775, 786-795 (D.C.Cir.1980); *Great Northern Railway Co. v. Superior Court, County of Alameda*, 12 Cal.App.3d 105, 112-116, 90 Cal.Rptr. 461, 466-467 (1970); *Credit Lyonnais Bank v. Manatt, et al*, 202 Cal.App.3d 1424, 1435, n. 17, 249 Cal.Rptr. 559, 565, n. 17 (1988); *Chambers v. Merrell-Dow Pharmaceuticals*, 35 Ohio St.3d 123, 132-33, 519 N.E.2d 370, 378-379 (1988); Note, *Forum Non Conveniens in California: Code of Civil Procedure Section 410.30*, 21 Hastings L.J. 1245-46 (1970). In each case, however, the trial judge must specify for the record each factor he or she considers and the manner in which these factors influenced the decision.

Accordingly, the *forum non conveniens* determination, though committed to the sound discretion of the trial court, must be carefully confined to a structured consideration of the relevant factors so that an appellate court may conduct a meaningful review of the decision. The

trial judge may not, for example, dismiss a case from the plaintiff's chosen forum simply because, in the court's view, another forum may be superior to that chosen by the plaintiff. *See Pain*, 637 F.2d at 783. The trial judge's discretion is not unlimited: "where there has been no *weighing* of the relative advantages of each forum but only a consideration of the drawbacks of one, that discretion has been abused." *Founding Church of Scientology v. Verlag*, 536 F.2d 429, 436 (D.C.Cir.1976) (emphasis in original); *see also Credit Lyonnais Bank*, 249 Cal.Rptr. at 566.

In the instant case, the trial judge dismissed the case without specifying on the record the factors which he considered and the way in which those considerations influenced his determination. I would reverse that part of the judgment of the court of appeals which precludes the possibility of a *forum non conveniens* dismissal, affirm that part of the judgment which reverses the dismissal, and remand this cause to the trial court for further proceedings not inconsistent with this opinion.

Response to J. Doggett's Concurrence

When you strip Justice Doggett's concurring opinion of its fiery rhetoric, it is clear that he has twisted my dissent to such an extent that ordinarily I would feel compelled to respond at length. Deprived of its rhetorical flourishes, however, his concurring opinion contains only the following conclusions:

> (1) The legislature has abolished *forum non conveniens*. (We are not told when or how this was accomplished);

(2) "As a matter of law and of public policy," the doctrine "should be abolished." 786 S.W.2d 689. (Why is this necessary if, as J. Doggett and the plurality claims, this was done by the legislature long ago?);

(3) *Allen v. Bass* is "compelling precedent" that the plaintiffs have an absolute right to bring suits in Texas. (In *Flaiz v. Moore* and in *Couch v. Chevron*, we said that this issue was an open question);

(4) The legal systems of many countries of the world are not as generous as ours, and the doctrine of *forum non conveniens* is a barrier to holding greedy, irresponsible multinational corporations accountable. The doctrine is therefore invalid on public policy grounds. (We are a court, not a legislative body. We do not have the power or authority to make this public policy decision).

Justice Doggett also criticizes the doctrine of *forum non conveniens* as "yet another legal fiction" and assumes that by calling it such he has challenged its validity. Taking this line of reasoning to its logical conclusion, it appears that Justice Doggett opposes the use of such legal fictions as corporations, constructive trusts, constructive notice, constructive fraud, and numerous others. In any event, he is incorrect in suggesting that *forum non conveniens* is a legal fiction, for a legal fiction is defined as an assumption of fact made by a court as a basis for deciding a legal question or a situation contrived by the law to permit a court to dispose of a matter. *See* Black's Law Dictionary (5th ed. 1979). *Forum non conveniens* requires the movant to prove to the court facts that warrant dismissal of the case.

In conclusion, I have no intent, much less "zeal" to implement social policy as Justice Doggett charges. That is not our role. It is clear that if anybody is trying to advance a particular social policy, it is Justice Doggett. I admire his altruism, and I too sympathize with the plight of the plaintiffs. However, the powers of this court are well-defined, and the sweeping implementations of social welfare policy Justice Doggett seeks to achieve by abolishing the doctrine of *forum non conveniens* are the exclusive domain of the legislature.

For all of the above reasons, I dissent.

COOK, Justice, dissenting.

Like turn-of-the-century wildcatters, the plaintiffs in this case searched all across the nation for a place to make their claims. Through three courts they moved, filing their lawsuits on one coast and then on the other. By each of those courts the plaintiffs were rejected, and so they continued their search for a more willing forum. Their efforts are finally rewarded. Today they hit pay dirt in Texas.

No reason exists, in law or in policy, to support their presence in this state. The legislature adopted within the statute the phrase "may be enforced" to permit plaintiffs to sue in Texas, irrespective of where they live or where the cause of action arose. The legislature did not adopt this statute, however, to remove from our courts all discretion to dismiss. To use the statute to sweep away, completely and finally, a common law doctrine painstakingly developed over the years is to infuse the statute with a power not contained in the words. Properly read, the statute is asymmetrical. Although it confers upon the

plaintiffs an absolute right to bring claims in our courts, it does not impose upon our courts an absolute responsibility to entertain those claims.

Even if the statute supported the court's interpretation, however, I would remain unwilling to join in the opinion. The decision places too great a burden on defendants who are citizens of our state because by abolishing *forum non conveniens*, the decision exposes our citizens to the claims of any plaintiff, no matter how distant from Texas is that plaintiff's home or cause of action. The interest of Texas in these disputes is likely to be as slight as the relationship of the plaintiffs to Texas. The interest of other nations, on the other hand, is likely to be substantial. For these reasons, I fear the decision allows assertions of jurisdiction by Texas courts that are so unfair and unreasonable as to violate the due process clause of the federal constitution.

I. PERSONAL JURISDICTION – FROM PRESENCE TO FAIR PLAY

Over a century ago, the United States Supreme Court was called upon to decide the reach of a state's power to adjudicate a resident plaintiff's claim against an out-of-state defendant in a state court. The Court adopted and applied a simple rule: the state's power to adjudicate was circumscribed by its borders. If a defendant was present within those borders, then he was subject to the state's jurisdiction. Thus, the state courts in Oregon could enter a binding personal judgment against the defendant if, and only if, he was personally served with process within

the state or voluntarily appeared before the court. *Pennoyer v. Neff*, 96 U.S. 714, 720-23, 24 L.Ed. 565 (1878).

The presence rule was onerous for both plaintiffs and defendants. Plaintiffs had to capture defendants within a state's borders to serve process. The law compensated for this burden upon plaintiffs by allowing them to serve even transient defendants. This concession to plaintiffs worked a hardship in defendants, who were subjected to assertions of jurisdiction no matter how fleeting the passage of the defendants through a state. For this hardship, the common law provided relief of another kind: the notion that litigants should not be confined to inappropriate forums. This idea, which has developed into what we now call the doctrine of *forum non conveniens* stepped in to bridge the gap between the interests of defendants and forums on the one hand a Pennoyer's dogmatic presence rule on the other. *See* Ehrenzweig, *The Transiency Rule of Personal Jurisdiction: the "Power" Myth and Forum Conveniens*, 65 Yale L.J. 289, 292 (1956).

Pennoyer's jurisdictional scheme proved too simplistic for the complexities of modern life, with its large corporations and controversies involving multi-state elements. A new jurisdictional rule was necessary. It was formulated when the United States Supreme Court dispensed with the presence rule and redefined the nature and extent of a state's power to adjudicate in the case of *International Shoe Co. v. Washington*, 326 U.S 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). In *Shoe*, the Court held that a state may exercise in personam jurisdiction over an out-of-state defendant when the defendant has certain minimum contacts with the forum such that maintenance of the suit

does not offend traditional notions of fair play and substantial justice. *Id.* at 316, 66 S.Ct. at 158.

Two standards derived from *Shoe*, the first relating to the existence of contacts between an out-of-state defendant and the forum, the second relating to motions of fair play and reasonableness. Although the standards have appeared at times to merge into one idea, they have evolved over the years to perform different functions in the due process analysis.

The first standard departs from the traditional concept, described in *Pennoyer*, that imposition of jurisdiction is always proper where a defendant is present in the forum. In place of that concept, the *Shoe* Court developed the less stringent requirement that a defendant have "minimum contacts" with the forum. *Id.* at 316, 66 S.Ct. at 158. The second standard appears as a theme underlying the first. This theme expresses the Court's belief that irrespective of the contacts upon which a state's exercise of jurisdiction is based, jurisdiction must still be consistent with "fair play and substantial justice." *Id.*

It is the first standard, contacts, that dominates both the reasoning in *Shoe* and in most of the subsequent jurisdiction decisions of the Court. This standard has developed to incorporate most of the rules that inhibit a state in its exercise of jurisdiction over an out-of-state defendant. It is true that in the forty years following *Shoe*, courts dutifully recited the fair play standard. But once courts applied the analysis developed under the contacts standard and found that minimum contacts existed, courts did not have to be concerned that jurisdiction

would falter upon application of the second, fair play, standard.

The dominance of *Shoe's* contacts standard diminished neither the need for nor recognition of the occasional application of the doctrine of *forum non conveniens*. In *Gulf Oil Corp v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1946), the United States Supreme Court acknowledged that a court may apply the doctrine and discussed the circumstances under which the doctrine is appropriate. These include both the private interest of the litigant and the public interest. Private interest considerations include the ease of access to sources of proof, the availability of witnesses, and any other practical problem that makes the trial of a case easy, expeditious, and inexpensive. *Id.* at 508, 67 S.Ct. at 843. Public interest concerns focus on a court's attention on such factors such as the administrative difficulties that result from litigation pile-ups and the burden of jury duty upon communities which have no relation to the litigation. *Id.* at 508-09, 67 S.Ct. at 843. The *Gilbert* decision, which came only one year after *Shoe*, provided the same balance to *Shoe's* jurisdictional scheme that post-*Pennoyer* jurisprudence provided to the presence test. *Forum non conveniens*, although not explicitly dealt with in the jurisdictional analysis, was still the bridge that transversed the gap between constitutional doctrines of jurisdiction and problems arising from inconvenient forums.

The pre-eminence of contacts over fair play as a jurisdictional yardstick began to taper when the Court decided *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). In *Volkswagen*, the Court both acknowledged the existence of the fair

play standard and extracted from prior case law the elements that comprise this standard. They include: (1) the burden on a defendant; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief, at least when the interest is not adequately protected by the plaintiff's power to choose the forum; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Id.* at 292, 100 S.Ct. at 564.

Volkswagen's accumulation of these factors transformed the fair play standard from a dutifully recited incantation to a substantial test for gauging the propriety of jurisdictional assertions. Although not applied in *Volkswagen*, the factors contained the sum of ideas concerning fair play and substantial justice that had developed in case law over the years. Not surprisingly, the factors included and overlapped some of the same ideas that had been developing in the doctrine of *forum non conveniens*. The test for jurisdiction and the test for forum appropriateness were, therefore, undergoing parallel developments. *See generally Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981).

In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), the Court gave real power to the fair play standard by stating that minimum contacts, even where established, may be considered in light of the *Volkswagen* factors to determine whether the assertion of jurisdiction comports with fair play and substantial justice. *Id.* at 476, 105 S.Ct. at 2184. At the same

time, the Court discussed the function of *forum non conveniens* in the context of a jurisdictional analysis. First, the Court conceded that, in most cases, the *Shoe* test of due process need never be implicated. Objections to jurisdiction arising from the fair play standard could be accommodated through a "means short of finding jurisdiction unreasonable." *Id.* at 477, 105 S.Ct. at 2184. In plainer words, a court could address the concerns inherent in the fair play standard without raising those concerns to the level of a constitutional inquiry. Second, the Court noted examples of "means short of finding jurisdiction unreasonable." Choice-of-law clashes, said the Court, may be accommodated through application of the forum's choice-of-law rules. Similarly, a defendant claiming substantial inconvenience may seek a change of venue under the federal venue statutes or *forum non conveniens. Id.*

The *Burger King* view of the proper place for *forum non conveniens* was, therefore, not so distant from the place the doctrine had occupied in the years following both *Pennoyer* and *Shoe*. The doctrine reached where the due process test of jurisdiction did not and, once again, bridged the gap between the due process test for jurisdiction and concerns about forum appropriateness. Where the law provided that bridge, there was no need for application of the *Volkswagen* factors. The Court made it clear, however, that where a defendant presents a compelling case that the presence of the *Volkswagen* factors renders jurisdiction unreasonable, then the Constitution comes into play, and the fair play standard may defeat jurisdiction.[1] *Id.* at 477-78, 105 S.Ct. at 2184-85.

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[1] Texas has expressly adopted *Burger King's* fair play analysis. *See Zac Smith & Co. v. Otis Elevator Co.*, 734 S.W.2d 662,

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Burger King's pronouncement, however strong, did not determine the outcome in that case. In *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), however, application of certain factors of the fair play standard defeated jurisdiction independently of considerations about the defendant's contacts with the forum state. *Id.* at 114-16, 107 S.Ct. at 1034-36. The Court decided that a Taiwanese company which had been sued and had settled with a California plaintiff could not seek indemnification from a Japanese defendant in a California court. Specifically, the Court was influenced by: (1) the procedural and substantive policies of other nations whose interests were affected by the assertion of the state's jurisdiction; (2) the slight interests of the Taiwanese plaintiff and the California forum in the state's assertion of jurisdiction over the defendant; and (3) the severe burden on the Japanese defendant. *Id.* Justice Brennan noted in his concurring opinion that the case presented one of those rare instances in which the fair play standard defeated jurisdiction even where the defendant had purposefully availed himself of the forum. *Id.* at 116, 107 S.Ct. at 1035. The fair play standard had achieved, at long last, the independent status and power of the contacts standard. As Justice Stevens flatly stated, "An examination of minimum contacts is not always necessary to determine whether a state court's assertion of personal jurisdiction is constitutional." *Id.* at 121, 107 S.Ct. at 1037.

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664 (1987); *cert. denied*, 484 U.S. 1063, 108 S.Ct. 1022, 98 L.Ed.2d 986 (1988).

II. FAIR PLAY IN THE ABSENCE OF FORUM NON CONVENIENS

In *Asahi*, the fair play standard acquired – and perhaps eclipsed – the force of the minimum contacts standard. It is now clear that consideration of fair play may defeat jurisdiction even where a defendant has minimum contacts with the forum. Should the same considerations be allowed to defeat the contacts that exist between defendant and forum in the case before us today? To arrive at the answer, I invite a comparison between *Asahi* and this case.

In *Asahi*, a foreign plaintiff sought to enforce his claim against a foreign defendant in a California court. The United States Supreme Court considered both of the standards derived from *Shoe*, dividing on the question whether the foreign defendant had sufficient contacts with California. Nevertheless, the fair play standard of the due process clause, standing alone, foreclosed the plaintiff's claim and defeated the court's jurisdiction. In the case before us today, a foreign plaintiff seeks to enforce his claim against a Texas defendant. These defendants may not defeat jurisdiction based on a contacts analysis, for they have many contacts with our state. The question remains, however, whether they are entitled to the same inquires into fair play afforded the foreign defendant in *Asahi*. If the answer is no, then the due process clause produces a lopsided and incorrect result: lopsided because it protects a foreign defendant from a foreign plaintiff but leaves a United States citizen exposed to liability from a similar source, incorrect because the Constitution does not afford greater protection to foreign plaintiffs than to American citizens. The

answer, therefore, must logically be yes. Where the assertion of jurisdiction threatens notions of fair play and substantial justice, then the elements of fair play must be investigated, irrespective of the contacts of the defendant.

III. ABOLITION OF FORUM NON CONVENIENS – EFFECTS ON THE FAIR PLAY ANALYSIS

I do not lightly suggest that the due process clause is, or should be, implicated in the case before this court. I am aware of Justice Brennan's observation in *Burger King* that, in most cases, fair play "considerations usually may be accommodated through means short of finding jurisdiction unreasonable." *Burger King*, 471 U.S. at 477, 105 S.Ct. at 2184. It is my belief, however, that in the absence of *forum non conveniens*, many of those accommodations cannot be made.

Consider, for example, the *Burger King* Court's statement that a defendant claiming inconvenience may seek a change of venue. *Id.* at 477, 105 S.Ct. at 2184. While transfer of venue is feasible only within a unitary judicial system, a defendant outside the system who claims substantial inconvenience may normally move for dismissal under the common-law doctrine of *forum non conveniens*. *Forum non conveniens* may indeed be a more appropriate vehicle than application of a due process analysis for taking account of defendant inconvenience. *See Stravitz, Sayonara to Minimum Contacts: Asahi Metal Industry Co. v. Superior Court*, 39 S.C.L.Rev. 729, 808-09 (1988). In this case, however, *forum non conveniens* has been abolished. No vehicle exists to take account of a defendant's inconvenience. Consequently, the common law factors that

once comprised the *forum non conveniens* analysis, factors that addressed complaints of inconvenience through a "means short of finding jurisdiction unreasonable," must now be raised to the level of a constitutional inquiry and subsumed within the fair play standard of the due process jurisdictional analysis.

IV. OTHER CONCERNS

Other considerations in this case implicate the fair play standard. Although they are too numerous and complex for analysis here, they are important enough to warrant the attention of the court and the litigants. First, we are inviting into our courts disputes that may involve more substantial connections to foreign countries than to our own. Should we not stop to consider, as the *Asahi* court did, the possible effects of extending our laws beyond the shores of the United States? *See generally* Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga.J.Int'l & Comp.L. 1 (1987).

Second, there are in this case unresolved choice of law questions that, once resolved, may diminish the interest of this state in this litigation. The plaintiffs proceed as though obtaining jurisdiction in Texas automatically confers upon them the benefits of Texas substantive law as well. As Justice Brennan made clear in *Burger King* when he urged consideration of choice of law principles as a "means short of finding jurisdiction unreasonable," such a result does not automatically follow. *Burger King*, 471 U.S. at 477, 105 S.Ct. at 2184. On remand the parties must debate choice of law before the trial court, which must again make a determination of the forum's contacts with

the plaintiff and the litigation. There is a strong possibility that a choice of law analysis will result in the application of Costa Rican law. If so, what then is Texas' interest in adjudicating a foreign claim by foreign plaintiffs? The *Volkswagen* factors are clear, and they include the forum state's interest in adjudicating the dispute as well as the interstate judicial system's interest in obtaining the most effective resolution of controversies. *Volkswagen*, 444 U.S. at 292, 100 S.Ct. at 564. Yet the majority fails to recognize the impact of choice of law on the fair play standard. This impact should be given more careful consideration.

Finally, and most important, I have questions concerning the propriety of exercising jurisdiction over plaintiffs whose relationship to this state is so attenuated. Although the United States Supreme Court's position on plaintiff-forum relationship has been uncertain, the law indicates a growing concern with that relationship. In two earlier cases, the Court rejected the notion that a plaintiff's contacts with the forum should be properly included in the due process analysis. *See Keeton v. Hustler Magazine, Inc.* 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984); *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). In *Burger King*, however, the Court included the plaintiff's interest in obtaining relief as one of the factors in the fair play analysis. *Burger King*, 471 U.S. at 477, 105 S.Ct. at 2184. And in *Asahi*, the Court attached importance to the lack of a relationship between the plaintiff and California, stating that "[b]ecause the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished." *Asahi*, 480 U.S. at 114, 107 S.Ct. at 1034.

It appears, therefore, that a plaintiff's relationship to the forum state constitutes a legitimate inquiry in the fair play analysis. Without a comprehensive record in this case, I decline to consider whether the plaintiffs are sufficiently connected with Texas such that their suit would not offend traditional motions of fair play and substantial justice. I believe, however, that the question ought to be investigated.[2]

V. CONCLUSION

The due process test for in personam jurisdiction has developed to protect defendants from unreasonable and unfair assertions of judicial power. The dominant component of the test has concentrated on a defendant's contacts with the forum, but the test includes another component, the recurring question whether the assertion of jurisdiction comports with constitutional guarantees of fair play and substantial justice. Although questions

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[2] *I also observe with interest that there may someday be a "means short of finding jurisdiction unreasonable" to answer the potential problem of foreign plaintiffs suing American defendants in American courts. Those means could come in the form of a federal law. In 1987, a bill was introduced in the House to amend the Judicial Code to provide specifically for removal to federal court actions commenced in state courts by foreign citizens against a United States citizen "for injury that was sustained outside the United States and relates to manufacture, purchase, sale, or use of a product outside the United States." See* H.R. 3662, 100th Cong. 1st Sess., 133 CONG.REC. 10,785-86 (1987). *In the 101st Congress, the bill was revised somewhat and has been reintroduced. See* H.R. 3406, 101st Cong., 1st Sess., 135 CONG.REC. 1124 (1989).

whether the forum is appropriate often encompass considerations of fair play, the due process test has not developed answers to these questions. Indeed, there has been no need for the test to do so, for the common law doctrine of *forum non conveniens* has bridged the gap between the due process test of jurisdiction and concerns about forum appropriateness. By abolishing the doctrine of *forum non conveniens*, the court shatters that bridge. The questions of fair play inherent in the *forum non conveniens* inquiry cannot now be answered unless they are answered within the context of the due process test for in personam jurisdiction.

HECHT, Justice dissenting.

Today the Court decrees that citizens of a foreign nation, Costa Rica, who claim to have been injured in their own country have an absolute right to sue for money damages in Texas courts. This same invitation extends to the citizens of every nation which would allow a Texas resident to sue in its courts in the most unlikely event he should ever want to. Citizens of foreign nations injured in Texas may certainly sue here; in some cases, they may sue in Texas even though they were injured elsewhere. But for this Court to give aliens injured outside Texas an absolute right to sue in this state inflicts a blow upon the people of Texas, its employers and taxpayers, that is contrary to sound policy.

The United States does not give aliens unlimited access to its court. Indeed, one federal district court in

California[1] and two in Florida[2] have already dismissed essentially this same lawsuit which the Court now welcomes to Texas. No state has ever given aliens such unlimited admission to its courts. The United States Supreme Court,[3]the District of Columbia,[4] and forty states[5] have all recognized what has come to be called the

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[1] *Aquilar v. Dow Chem. Co.*, No. 86-4753 JGD (C.D.Cal.1986), cited in *Cabalceta v. Standard Fruit Co.*, 667 F.Supp. 833, 837, *aff'd in part and rev'd in part on other grounds*, 883 F.2d 1553 (11th Cir.1989).

[2] *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir.), *cert. denied*, 474 U.S. 948, 106 S.Ct. 347, 88 L.Ed.2d 294 (1985); *Cabalceta v. Standard Fruit Co.*, 667 F.Supp. 833 (S.D.Fla.1987), *aff'd in part and rev'd in part on other grounds*, 883 F.2d 1553 (11th Cir.1989) (holding that if the district court had jurisdiction of the action removed from state court, its dismissal on the grounds of forum non conveniens was appropriate, and that if it did not, the action must be remanded to state court).

[3] *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981).

[4] *Mills v. Aetna Fire Underwriters Ins. Co.*, 511 A.2d 8 (D.C.1986).

[5] *Crowson v. Sealaska Corp.*, 705 P.2d 905 (Alaska 1985); *Avila v. Chamberlain*, 119 Ariz. 369, 580 P.2d 1223 (1978); *Running v. Southwest Freight Lines*, 227 Ark. 839, 303 S.W.2d 578 (1957); *Archibald v. Cinerama Hotels*, 15 Cal.3d 853, 126 Cal.Rptr. 811, 544 P.2d 947 (1976); *State v. District Court*, 635 P.2d 889 (Colo.1981); *Miller v. United Technologies Corp.* 40 Conn. Supp. 457, 515 A.2d 390 (1986); *State Marine Lines v. Domingo*, 269 A.2d 223 (Del.1970); *Houston v. Caldwell*, 359 So.2d 858 (Fla.1978); *Allen v. Allen*, 64 Haw. 553, 645 P.2d 300 (1982); *Jones v. Searles Laboratories*, 93 Ill.2d 366, 67 Ill.Dec. 118, 444 N.E.2d 157 (1982); *McCracken v. Eli Lilly & Co.*, 494 N.E.2d 1289

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rule of forum non conveniens. Simply stated, the rule is that "[a] state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to

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(Ind.Ct.App.1986); *Silversmith v. Kenosha Auto Transport*, 301 N.W.2d 725 (Iowa 1981); *Quillin v. Hesston Corp.*, 230 Kan. 591, 640 P.2d 1195 (1982); *Carter v. Netherton*, 302 S.W.2d 382 (Ky.1957); *Stewart v. Litchenberg*, 148 La. 195, 86 So. 734 (1920); *Foss v. Richards*, 126 Me. 419, 139 A. 313 (1927); *Texaco v. Vanden Bosche*, 242 Md. 334, 219 A.2d 80 (1966); *Joly v. Albert Laroque Lumber Ltd.*, 397 Mass. 43, 489 N.E.2d 698 (1986); *Anderson v. Great Lakes Dredge & Dock Co.*, 411 Mich. 619, 309 N.W.2d 539 (1981); *Johnson v. Chicago, Burlington & Quincy R.R.*, 243 Minn. 58, 66 N.W.2d 763 (1954); *Illinois Cent. Rd. Co. v. Moore*, 215 So.2d 419 (Miss. 1968); *Besse v. Missouri Pacific R.R.*, 721 S.W.2d 740 (Mo.1986), *cert. denied*, 481 U.S. 1016, 107 S.Ct. 1894, 95 L.Ed.2d 501 (1987); *Qualley v. Chrysler Credit Corp.*, 191 Neb. 787, 217 N.W.2d 914 (1974); *Payne v. Eighth Jud. Dist. Court*, 97 Nev. 228, 626 P.2d 1278 (1981); *Van Dam v. Smit*, 101 N.H.508, 148 A.2d 289 (1959); Gore v. United States Steel Corp., 15 N.J. 301, 104 A.2d 670, *cert. denied*, 348 U.S. 861, 75 S.Ct. 84, 99 L.Ed. 678 (1954); *McLam v. McLam*, 85 N.M. 196, 510 P.2d 914 (1973); *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478 N.Y.S.2d 597, 467 N.Ed.2d 245 (1984); *Motor Inn Mgmt. Inc. v. Irvin-Fuller Dev. Co.*, 46 N.C.App. 707, 266 S.E.2d 368, *review denied*, 301 N.C. 93, 273 S.E.2d 299 (1980); N.D.R.Civ.Pro. 4(b)(5); *Chambers v. Merrell-Dow Pharm.*, 35 Ohio St.3d 123, 519 N.Ed.2d 370 (1988); *Groendyke Transp., Inc. v. Cook*, 594 P.2d 369 (Okla.1979); *Horner v. Pleasant Creek Mining Corp.*, 165 Or. 683, 107 P.2d 989 (1940); *Rini v. New York Cent. R.R. Co.*, 429 Pa. 235, 240 A.2d 372 (1968); *Braten Apparel Corp. v. Bankers Trust Co.*, 273 S.C. 663, 259 S.E.2d 110 (1979); *Zurick v. Inman*, 221 Tenn. 393, 426 S.W.2d 767 (1968); *Kish v. Wright*, 562 P.2d 625 (Utah 1977); *Burrington v. Ashland Oil Co.*, 134 Vt. 211, 356 A.2d 506 (1976); *Werner v. Werner*, 84 Wash.2d 360, 526 P.2d 370 (1974); Wis.Stat.Ann. § 262.19.

the plaintiff." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 (1971). The rule is founded in "considerations of fundamental fairness and sensible and effective judicial administration." *Adkins v. Chicago, R.I. & Pac. R.R.*, 54 Ill.2d 511, 301 N.E.2d 729, 730 (1973). Until now, no state has ever rejected this rule.[6] This Court, however, does not even acknowledge the collective wisdom of the entire country.

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[6] Of the nine states that have not recognized the rule of forum non conveniens, none have rejected it absolutely as the Court does today. As discussed below. Alabama did reject the rule of forum non conveniens at one time but has since recognized it by statute. Montana has refused to apply the rule of forum non conveniens in actions under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1986), but has expressly reserved the issue of the applicability of the rule to other actions. *Labella v. Burlington Northern, Inc.*, 182 Mont. 202, 595 P.2d 1184, 1187 (1979). An Idaho appellate court has suggested that the rule would apply in appropriate cases. *Nelson v. Worldwide Lease, Inc.*, 110 Idaho 369, 716 P.2d 513, 518 n.1 (App.1986). Georgia, like Montana, would not apply the rule in FELA cases, *see Brown v. Seaboard Coast Lines R.R.*, 229 Ga. 481, 192 S.E.2d 382, 383 (1972), but has suggested that it might apply in other cases, *Smith v. Board of Regents*, 165 Ga.App. 565, 302 S.E.2d 124, 125 (1983). West Virginia also declines to apply the rule in FELA cases, but has not expressly ruled in its application in other contexts. *Gardner v. Norfolk and W. Ry. Co.*, ___ W.Va. ___, 372 S.E.2d 786 (W.Va.1988). Connecticut has applied forum non conveniens factors in a case without referring to the rule by name. *Miller v. United Technologies Corp.*, 40 Conn.Supp. 457, 515 A.2d 390 (1986). Wyoming has not resolved the issue. *Booth v. Magee Carpet Co.*, 548 P.2d 1252, 1255 n.2 (Wyo.1976). Alaska has refused to reject one case on grounds of forum non conveniens, but did not absolutely reject the rule in all cases. *Crowson v. Sealaska Corp.*, 705 P.2d 905 (Alaska 1985). Virginia, Rhode Island and South Dakota do not appear to have considered application of the rule.

To abolish the rule of forum non conveniens in personal injury and death cases, the Court relies upon no authority other than a 1913 statute, which it never analyzes, and one sentence from a 1932 court of appeals decision. Neither of these authorities is sufficient support for the Court's sweeping decision, as I demonstrate below. Furthermore, and equally troubling, the Court attempts no response to the petitioners' very substantial arguments that the rule of forum non conveniens does and should apply in Texas.

I

Section 71.031 of the Texas Civil Practice and Remedies Code states:

> (a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:
>
> (1) a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;
>
> (2) the action is begun in this state within the time provided by the laws of this state for beginning the action; and
>
> (3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.
>
> (b) All matters pertaining to procedure in the prosecution or maintenance of the action in

> the courts of this state are governed by the law of this state.
>
> (c) The court shall apply the rules of substantive law that are appropriate under the facts of the case.

This statute is a nonsubstantive recodification of its predecessor, article 4678 of the Texas Revised Civil Statutes, which the trial court applied. As it affects this case, the statute has not been changed materially since it was first passed in 1913 and amended in 1917.[7]

The plain language of this statute is permissive: the actions described "*may* be enforced in the courts of this state". The statute thus prohibits dismissal of an action within its ambit solely because plaintiffs reside or the

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[7] The original act provided "[t]hat whenever the death or personal injury of a citizen of this State or of a country having equal treaty rights with the United States on behalf of its citizens, has been or may be caused by a wrongful act, neglect or default in any State, for which a right to maintain an action and recover damages in respect thereof is given by a statute or by law of such State, territory or foreign country, such right of action may be enforced in the courts of the United States, or in the courts of this State, within the time prescribed for the commencement of such action by the statute of this State, and the law of the former shall control in the maintenance of such action in all matters [pertaining] to procedure." Act of Apr. 8, 1913, ch. 161, 1913 Tex.Gen.Laws 338-339, *repealed by* Revised Statutes, § 2, 1925 Tex.Rev.Civ.Stat. 2419.

This act was amended in 1917 to apply to citizens of the United States as well as of this State and foreign countries and to clarify that the actionable injury could occur not only in another state but also in a foreign country. Act of March 30, 1917, ch. 156, 1917 Tex.Gen.Laws 365, *repealed by* Revised Statutes, § 2, 1925 Tex.Rev.Civ.Stat. 2419.

action arose outside Texas. The Legislature has plainly opened the door to such actions; but the Court tears the door off its hinges. Not only does the statute allow foreign actions, the Court says, it mandates them. The Court would be correct if the statute stated that the actions it describes "*shall* be enforced in the courts of this state". But it does not say so. The statute does not create an absolute right to bring a personal injury action in Texas no matter how little it has to do with this state, how inconvenient it is to the parties, and how burdensome it is to the courts and the people of Texas who must pay for them. The statute certainly does not explicitly revoke the rule of forum non conveniens.

The Court's analysis of the statute consists of quoting it. The Court then argues with JUSTICE GONZALEZ's dissent about whether the rule of forum non conveniens existed in Texas prior to 1913, when the statute was first enacted. The point of this argument appears to be that the Legislature *could have* abolished the rule in 1913 because it had been recognized earlier. This argument is at best inconclusive. The Legislature could have made the right to bring actions under the 1913 statute absolute regardless of whether anyone had ever heard of the principles of forum non conveniens, by that name or any other. The issue is not what the Legislature *could have done*, but what it *did do*.

Just as the Court ignores other states' acknowledgment of the rule of forum non conveniens, it ignores other states' construction of similar statutes. The supreme courts of other states with statutes similar to section 71.031 containing the term "may" have held those statutes to be permissive and have applied the rule of forum

non conveniens. For instance, the Kansas statute provides:

> Whenever a cause of action has accrued under or by virtue of the laws of any other state or territory, such cause of action *may* be sued upon in any of the courts of this state by the person or persons who are authorized to bring and maintain an action thereon in the state or territory where the same arose.

KAN.STAT.ANN. § 60-217(b) (1983) (emphasis added). Despite terms nearly identical to the Texas statute, Kansas applies forum non conveniens. *Gonzales v. Atchison, T. & S.F. Ry.*, 189 Kan. 689, 371 P.2d 193 (1962). Similarly, the Iowa statute provides:

> An action *may* be brought against any railway corporation, the owner of stages, or other line of coaches or cars . . . or persons operating the same, in any county through which such road or line passes or is operated.

IOWA CODE § 616.8 (1950) (emphasis added). Despite this statute, however, Iowa applies the doctrine of forum non conveniens. *Silversmith v. Kenosha Auto Transp.*, 301 N.W.2d 725, 727 (Iowa 1981).

By comparison, Alabama had a specific mandatory statutory provision which stated:

> Whenever, either by common law or the statutes of another state, a claim either upon contract or in tort has arisen in such other state against any person or corporation, such cause of action *shall* be enforceable in the courts of this state. . . .

ALA.CODE § 6-5-430 (1975) (emphasis added). While this statute was effective, the Alabama Supreme Court construed this statute to preclude application of the rule of

forum non conveniens. *Central of Ga. Ry. v. Phillips*, 286 Ala. 365, 240 So.2d 118 (1970). The use of the mandatory verb "shall" in the Alabama statute stood in stark contrast to the use of the discretionary verb "may" in the Texas, Kansas, and Iowa statutes. In 1987 the Alabama Legislature amended its statute to recognize expressly the rule of forum non conveniens:

> Whenever, either by common law or the statutes of another state or of the United States, a claim either upon contract or in tort has arisen outside this state against any person or corporation, such claim *may* be enforceable in the courts of this state . . . provided, however, the courts of this state shall apply the doctrine of forum non conveniens in determining whether to accept or decline to take jurisdiction of an action based upon such claim originating outside this state.

ALA.CODE § 6-5-430 (1987) (emphasis added). When Alabama's legislature chose to change its law to ensure recognition of the rule of forum non conveniens, it changed "shall be enforceable" to "may be enforceable". The Texas Legislature's use of "may" in the same context is no less permissive and no more mandatory.

The language of section 71.031 simply does not support the Court's holding. The very most the Court can say is that the statute is unclear. If there were some ambiguity in the statute, surely the Court should suggest some rationale for resolving the ambiguity the way it has. The sole authority the Court offers in support of its holding is *Allen v. Bass*, 47 S.W.2d 426 (Tex.Civ.App. – El Paso 1932, writ ref'd).

II

Allen v. Bass was a suit by one New Mexico resident against another for personal injuries sustained in an automobile accident which occurred in New Mexico. The trial court dismissed the action as "an improper interference with the jurisdiction that should and ought to be exercised by the State of New Mexico". *Id.* Citing the 1913 and 1917 versions of article 4678, predecessors to current section 71.031, the court of appeals reversed, saying: "we think [the plaintiff] has an absolute right to maintain the present action in the courts of this state . . . , and the courts of this state are left without any discretion in the matter." 47 S.W.2d at 427. The court then added:

> We have concluded that article 4678 opens the courts of this state to *citizens of a neighboring state* and gives to them an absolute right to maintain a transitory action of the present nature and to try their cases in the courts of this state.

Id. (emphasis added). One might wonder whether the court of appeals in 1932 ever envisioned that one unnecessarily broad sentence in its opinion would someday be authority for compelling Texas courts to hear plaintiffs and actions from around the world. Nevertheless, *Allen v. Bass*, even if myopic, is clear and, as the Court concludes, indistinguishable on any principled ground.

Allen v. Bass should not control this case. In over half a century, that case has never been followed by another court. Two courts of appeals have expressly rejected it as authority. *McNutt v. Teledyne Indus., Inc.*, 693 S.W.2d 666, 668 (Tex.App. – Dallas 1985, writ dism'd); *Forcum-Dean Co. v. Missouri Pac. R.R.*, 341 S.W.2d 464, 465-466

(Tex.Civ.App. – San Antonio 1960, writ dism'd). More importantly, this Court as recently as six years ago stated: "the applicability of forum non conveniens to an article 4678 cause of action is an open question. *Flaiz v. Moore*, 359 S.W.2d 872, 876 (Tex.1962)." *Couch v. Chevron Int'l Co.*, 682 S.W.2d 534, 535 (Tex.1984). Thus, *Couch* and *Flaiz* unmistakably disapproved the broad language of *Allen v. Bass* without even bothering to cite it. The Court does not mention, explain or attempt to distinguish any of these authorities which cast grave doubt upon the sole basis of its holding.[8]

Allen v. Bass is far too feeble a precedent to support the Court's expansive holding. That case is simply an aberration in the jurisprudence of not only the state but the country, and I would overrule it.

III

The dearth of authority for the Court's unprecedented holding is disturbing. Far more disconcerting, however, is the Court's silence as to why the rule of forum non conveniens should be abolished in personal injury and death cases, either by the Legislature or by the

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[8] Justice Doggett's concurring opinion objects that this analysis does not give proper deference to the doctrine of stare decisis. Justice Doggett did not defend the doctrine quite so vigorously in his very first opinion as a member of this Court, which overruled two prior decisions of this Court. *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex.1989) (overruling, in part, *Sakowitz, Inc. v. Steck*, 669 S.W.2d 105 (Tex. 1984), and *Black Lake Pipe Line Co. v. Union Construction Co.*, 538 S.W.2d 80 (Tex.1976). Stare decisis cannot save *Allen v. Bass*. Its language simply cannot coexist consistently with *Couch*.

Court. If the Legislature did abolish the rule of forum non conveniens by statute in 1913, what does the Court think the Legislature expected to accomplish for the people of this state?[9] The benefit to the plaintiffs in suing in Texas should be obvious: more money, as counsel was candid enough to admit in oral argument.[10] This advantage to suing in American courts has not escaped international notice. England's Lord Denning, for example, has observed, "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune." *Smith Kline & French Laboratories Ltd. v. Bloch*, (1983) 2 All E.R. 72, 74, *in* Note, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond "Reyno"*, 64 Texas L.Rev. 193, 197-8, n. 28 (1985).

But what purpose beneficial to the people of Texas is served by clogging the already burdened dockets of the state's courts with cases which arose around the world and which have nothing to do with this state except that

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[9] The issue for the Court is not whether the Legislature *should* have abolished forum non conveniens, but whether it *did*. If it did, it surely must be presumed to have acted in the best interests of the people of Texas. The purpose of examining the public policies which support the rule of forum non conveniens is not to argue for retention of the rule but to show that the Legislature would not be motivated to abolish the rule.

[10] It is equally plain to me that defendants want to be sued in Costa Rica rather than Texas because they expect that their exposure will be less there than here. However, it also seems plain to me that the Legislature would want to protect the citizens of this state, its constituents, from greater exposure to liability than they would face in the country in which the alleged wrong was committed. This would be incentive for the Legislature *not* to abolish the rule of forum non conveniens.

the defendant can be served with citation here? Why, most of all, should Texas be the only state in the country, perhaps the only jurisdiction on earth, possibly the only one in history, to offer to try personal injury cases from around the world? Do Texas taxpayers want to pay extra for judges and clerks and courthouses and personnel to handle foreign litigation? If they do not mind the expense, do they not care that these foreign cases will delay their own cases being heard? As the courthouse for the world, will Texas entice employers to move here, or people to do business here, or even anyone to visit? What advantage for Texas does the Court see, or what advantage does it think the Legislature envisioned, that no other jurisdiction has ever seen, in abolishing the rule of forum non conveniens for personal injury and death cases? Who gains? A few lawyers, obviously. But who else? If the Court has good answers to these questions, why does it not say so in its opinion? If there are no good answers, then what the Court does today is very pernicious for the state.[11]

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[11] Justice Doggett's concurring opinion undertakes to answer these questions that the Court ignores. It suggests that there are essentially two policy reasons to abolish the rule of forum non conveniens: to assure that injured plaintiffs can recover fully, and to assure that American corporations will be fully punished for their misdeeds abroad. Neither reason is sufficient. If the defendants in this case were Costa Rican corporations which plaintiffs could sue only in Costa Rica, plaintiffs would be limited to whatever recovery they could obtain in Costa Rican courts. The concurring opinion has not explained why Costa Rican plaintiffs who claim to have been injured by American corporations are unjustly treated if they

(Continued on following page)

The rule of forum non conveniens, properly used, does not prohibit a court from entertaining a case it ought to hear. Rather, it protects courts from being compelled to hear cases when doing so would be fundamentally unfair to the defendants or the public or both. The rule recognizes that there are unusual cases which a court has power to hear but which it should nevertheless decline. The rule thus provides some play in the otherwise relatively rigid jurisdictional and venue joints of the judicial system. The factors to be considered in determining the application of the rule were set forth at length by the United States Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-509, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947):

> An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease

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(Continued from previous page)

are required to sue in their own country where they could only sue if they had been injured by Costa Rican corporations. In other words, why are Costa Ricans injured by an American defendant entitled to any greater recovery than Costa Ricans injured by a Costa Rican defendant, or a Libyan defendant, or an Iranian defendant? Moreover, the concurring opinion does not explain why the American justice system should undertake to punish American corporations more severely for their actions in a foreign country than that country does. If the alleged conduct of the defendants in this case is so egregious, why has Costa Rica not chosen to afford its own citizens the recovery they seek in Texas? One wonders how receptive Costa Rican courts would be to the pleas of American plaintiffs against Costa Rican citizens for recovery of all the damages that might be available in Texas, or anywhere else for that matter.

> of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.
>
> Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

The relative importance of private factors as compared with public factors may have shifted since *Gulf Oil*. Ease of travel and communication, availability of evidence by

videotape and facsimile transmission, and other technological advances have reduced the significance of some private inconvenience factors. The public factors, however deserve the same consideration now as when *Gulf Oil* was written.

The balancing of public and private considerations in applying the rule of forum non conveniens is primarily the responsibility of the trial court. "The forum non conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all the relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257, 102 S.Ct. 252, 266, 70 L.Ed.2d 419 (op. by Marshall, J., citing *Gilbert*, 330 U.S. at 511-12, 67 S.Ct. at 844-45, and *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 531, 67 S.Ct. 828, 835, 91 L.Ed. 1067 (1947)). To allow for meaningful appellate review, however, the trial judge must enunciate the factors considered and the reasons for the balance struck. The trial court in the present case did not provide this essential basis for its decision to dismiss this case. I cannot determine from the record before us whether the trial court was correct in dismissing this case on the grounds of forum non conveniens. Consequently, I would reverse the trial court's dismissal of the case and remand to that court for further consideration in light of this opinion. I would, however, reverse the judgment of the court of appeals to the extent that it precludes the possibility of dismissal after proper application of the rule of forum non conveniens. I would hold, not that the rule of forum

non conveniens should be applied in *this* case, but only that it can be applied in a *proper* case. I would intimate no decision on whether this would be shown to be a proper case after further proceedings in the trial court.

The plaintiffs in this case are certainly entitled to justice. But so are the people of Texas. And it may well be that justice for both groups requires that these plaintiffs pursue their remedies fully in Costa Rica, their home. I therefore dissent.

APPENDIX 2

Opinions of the Texas Court of Appeals for the First Supreme Judicial District in Alfaro v. Dow Chemical Co., 751 S.W.2d 208 (Tex. App. – Houston [1st. Dist.] 1988).

Domingo Castro ALFARO, et al., Appellants,

v.

DOW CHEMICAL, et al., Appellees.

No. 01-87-00700-CV.

Court of Appeals of Texas,
Houston (1st Dist.).

March 24, 1988.
Rehearing Denied June 16, 1988.
Before WARREN, DUGGAN and LEVY, JJ.

OPINION

WARREN, Justice.

This is an appeal from the trial court's "forum non conveniens" dismissal of appellants' suit.

Appellants are all Costa Rican residents. Appellee Dow Chemical ("Dow") is a Delaware corporation with its principal place of business located in Midland, Michigan. Appellee Shell Oil Company ("Shell") is a Delaware corporation with its principal place of business located in Houston, Texas. Both Dow and Shell are authorized to do business in Texas.

Appellants' suits claim that while working for Standard Fruit on a banana plantation in Costa Rica, they were required to handle DBCP, a pesticide manufactured and furnished to Standard Fruit by Dow and Shell; that their handling of the DBCP caused them physical and

mental damages, including irreversible sterility; and that appellees were liable for damages under the theories of products liability, strict liability, and breach of warranty.

Appellees contested the jurisdiction of the Texas trial court and, alternatively, contended that the cause should be dismissed under the forum non conveniens doctrine.

The trial court found that it had jurisdiction under Tex.Civ.Prac. & Rem.Code Ann. § 71.031 (Vernon 1986), but dismissed the cause for forum non conveniens.

In a single point of error, appellants claim that forum non conveniens dismissal is precluded by § 71.031, which provides:

> Act or Omission Out of State
>
> (a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign county may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:
>
> (1) a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;
>
> (2) the action is begun in this state within the time provided by the laws of this state for beginning the action; and
>
> (3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.
>
> (b) All matters pertaining to procedure in the prosecution or maintenance of the action in the

courts of this state are governed by the law of this state.

(c) The court shall apply the rules of substantive law that are appropriate under the facts of the case.

In four cross-points of error, Shell claims:

(1) that the court erred in finding that it had jurisdiction over the case;

(2) that the court erred in holding that plaintiffs had established a prima facie cause of action against Shell; and

(3) that the evidence was legally and factually insufficient to show that plaintiffs had complied with the requirements of § 71.031.

We must first determine whether the trial court had jurisdiction, because forum non conveniens does not apply unless there is jurisdiction. *Cole v. Lee*, 435 S.W.2d 283 (Tex.Civ.App. – Dallas 1968, writ dism'd).

Shell and Dow are both foreign corporations licensed to do business in Texas. As such, they are not residents. *H. Rouw Co. v. Railway Express Agency*, 154 S.W.2d 143 (Tex.Civ.App. – El Paso 1941, writ ref'd).

All plaintiffs are citizens of Costa Rica, and the events giving rise to their cause of action all occurred in Costa Rica.

Although there is little Texas nexus in our case, § 71.031 gives appellants the right to sue in Texas if: (1) Costa Rica affords appellants a like action; (2) the action is brought in Texas within the time provided by our laws; and (3) Costa Rica has equal treaty rights with the United States on behalf of its citizens.

There is little dispute among the parties as to (1) and (3) above, but whether the suit was brought within the Texas limitations period is fiercely contested.

Both Shell and Dow admit selling DBCP to Standard Fruit in Costa Rica, but Shell claims that it made its last delivery in 1970, and Dow claims that it made its last delivery in 1978. Appellants filed suit in 1984.

Tex.Civ.Prac. & Rem.Code Ann. § 16.003 (Vernon 1986) (formerly art. 5526), requires that suits based upon negligence or strict liability must be brought no later than two years after the cause of action accrues.

Tex.Bus. & Com.Code Ann. § 2.725 (Vernon 1968) provides that an action for breach of warranty must be brought within four years after the action accrues. A cause of action in tort arises when the injury and its cause are discovered. *Robinson v. Weaver,* 550 S.W.2d 19 (Tex.1977); *Corder v. A.H. Robins Co.,* 692 S.W.2d 194 (Tex.App. – Eastland 1985, no writ).

A cause of action for breach of warranty accrues on the date of tender of delivery of the product. *Garcia v. Texas Instruments, Inc.,* 610 S.W.2d 456 (Tex.1980).

Appellees claim that appellants failed to file suit within the Texas statute of limitations, and therefore did not meet the requirement of subsection (a)(2) of § 71.031. Appellants dispute this claim.

Each party submitted controverting affidavits and discovery in support of its position on the limitations issue. It is apparent that there were numerous fact questions raised by both sides. However, the right to a

trial by jury does not attach to a preliminary determination of jurisdiction. *Bearden v. Texas Co.*, 41 S.W.2d 447, 458 (Ct.Civ.App.1931), *aff'd*, 60 S.W.2d 1031 (Tex.Comm'n.App.1933). Therefore, the trial judge was authorized to make a preliminary decision on the existence of jurisdiction over the subject matter of this suit.

We must assume that appellants' allegations concerning their cause of action are true, absent an assertion by the appellees that they are not made in good faith and are made solely to confer jurisdiction. *Brannon v. Pacific Employers Ins. Co.*, 148 Tex. 289, 294, 224 S.W.2d 466, 469 (1949). Based on appellants' allegations in the record before this Court, the trial court did not err in finding that it had jurisdiction to hear the case.

Appellees' cross-points are overruled.

Appellants' point of error raises the question of whether § 71.031, which creates jurisdiction for personal injury and wrongful death claims arising outside the State, precludes a trial court from invoking the common-law doctrine of "forum non conveniens" in an appropriate situation.

The pertinent language of subsection (a) provides that, "An action *may be enforced* in the courts of this state. . . . "

Appellants claim that their statutory right to maintain suit in a Texas district court is not subject to dismissal for forum non conveniens. Appellees maintain that the statute does not deprive the court of discretion to dismiss the case for forum non conveniens.

The Texas Supreme Court has consistently declined to address this question. In *Flaiz v. Moore*, 359 S.W.2d 872, 876 (Tex. 1962), the court concluded its opinion with the following notation:

> It should be pointed out that we have not considered or attempted to decide in this case: (1) the extent to which the forum non conveniens principle is recognized in Texas; (2) whether Article 4678 [predecessor of 71.031] is mandatory and deprives the court of any discretion where considerations relating to either the parties or the subject matter indicate that the controversy should be submitted to and determined by another forum; (3) whether the absence of party connections with the forum may be raised by the trial court on its own Motion; and (4) where the burden of proof lies when the doctrine of forum non conveniens is properly invoked.

In *Francis v. Herrin Transportation Co.*, 432 S.W.2d 710 (Tex.1968), the court expressed no opinion as to the merit of a forum non conveniens plea, and referred the reader to its *Flaiz* decision.

More recently, in *Couch v. Chevron International Oil Co.*, 672 S.W.2d 16 (Tex. App. – Houston [14th Dist.] 1984), *writ ref'd n.r.e. per curiam*, 682 S.W.2d 534 (Tex.1984) (op. on reh'g), the Supreme Court affirmed the appellate court, but reiterated that the applicability of forum non conveniens to § 71.031 is an open question.

Each party claims that the language of the statute supports its position. Appellees argue that the use of the words "*may* be enforced" indicates that the legislature

recognized the trial court's discretionary power to dismiss. However, we agree with appellants that the legislature did not intend to *require* a plaintiff to bring suit in a Texas court, but merely to *allow* him to bring suit in Texas. Use of the words "shall" or "must" would have the undesired effect of limiting a plaintiff's choice of venue. Therefore, the "may" language is not dispositive.

However, we do think it relevant that the statute provides that an action may be "enforced" in a Texas court, rather than merely allowing an action to be "brought" in this State. This could indicate a legislative intent that foreign plaintiffs be allowed not only to *file* suit in a Texas court, but to remain in a Texas court throughout the enforcement of the action through execution.

Although the Texas Supreme Court has not decided this question, it has evidenced an opinion that § 71.031 preempts the forum non conveniens doctrine.

Couch v. Chevron International Oil Co. was an appeal of the dismissal of a Jones Act suit in state court. The 14th Court of Appeals stated that article 4678 did not give a foreign plaintiff an absolute right to bring an action in the Texas courts, and was not intended to apply to all wrongful death claims. The court then noted that the case was brought under the Jones Act, and upheld the dismissal, noting that the Texas Wrongful Death Act, of which article 4678 was a part, yields to the exclusivity of federal maritime law. The supreme court refused the writ application, no reversible error, but noted, "Although the court of appeals reached the correct decision, that part of its

opinion pertaining to article 4678 and 'forum non conveniens' is dicta. Thus, the applicability of forum non conveniens to an article 4678 cause of action is an open question." 682 S.W.2d at 535.

It is relevant to our decision to note that nothing in the court of appeals' decision required the supreme court to disavow it in an opinion. The appellate decision specifically recognized that, "[t]he Texas Supreme Court has . . . expressly reserved the decision as to the extent to which the doctrine is applicable under Article 4678." 672 S.W.2d at 18. The logical conclusion from the supreme court's statements is that that court disagreed with the appellate court's assertion that "Article 4678 does not give a foreign plaintiff an absolute right to bring his cause of action in the Texas courts." 672 S.W.2d at 17.

Further indicia of the likely position of the supreme court on this question is the court's action in *McNutt v. Teledyne Industries, Inc.*, 693 S.W.2d 666 (Tex.App. – Dallas 1985, no writ). In that case, the court of appeals held that forum non conveniens dismissal was available under article 4678. The supreme court granted writ of error, 29 Tex.Sup.Ct.J. 66 (Nov. 20, 1985), but the case settled prior to oral argument. The supreme court then voluntarily issued a judgment letter setting aside the judgments of the trial court and the court of appeals.

Although these actions by the supreme court are not definitive of any particular statutory interpretation of § 71.031, we think they lend credence to appellants' position that the statute preempts a forum non conveniens plea. (*See* Judge Gee's interesting observations in *Exxon*

Corp. v. Chick Kam Choo, 817 F.2d 307, 315-316 (5th Cir.1987)).

Although we are of the opinion that public policy considerations favor allowing Texas district courts to exercise at least some limited discretion in deciding whether Texas is the most appropriate forum for cases brought under § 71.031, our construction of the statute and the apparent inclination of the Texas Supreme Court on this question require a holding that § 71.031 provides a foreign plaintiff with an absolute right to maintain a death or personal injury cause of action in Texas, without being subject to forum non conveniens dismissal.

Reversed and remanded.

DUGGAN, J., dissenting.

DUGGAN, Justice, dissenting.

It is difficult for me to believe that the Texas legislature intended by § 71.031 to permit all foreigners who imagine themselves aggrieved by American entities or individuals operating in foreign countries, but also doing business in Texas, to maintain their tort suits in Texas – without the slightest regard for nexus or convenience.

To hold that no plea of forum non conveniens will be allowed, regardless of inconvenience and potential unfairness, will no doubt subject the statute to well-deserved due process attacks.

The majority correctly states that the Texas Supreme Court has not spoken decisively on the issue in the succession of cases enumerated in the majority opinion. I believe the reason for this is that our highest court recognizes the potential for unfairness that could follow a

sweeping abolition of the doctrine of forum non conveniens, and wisely intends that the doctrine remain in place as a tool for trial courts' use in the sound exercise of judicial discretion.

Two of the most instructive intermediate court opinions to explicitly recognize the doctrine of forum non conveniens were written by intermediate level appellate judges who later became distinguished justices on the Supreme Court of Texas. *Flaiz v. Moore*, 353 S.W.2d 74 (Tex.Civ. App. – San Antonio 1962), *rev'd on other grounds*, 359 S.W.2d 872 (Tex.1962) (Judge Pope); and *Forcum Dean Co. v. Missouri Pacific R.R. Co.*, 341 S.W.2d 464 (Tex.Civ. App. – San Antonio 1960, no writ) (Judge Barrow.) It is interesting to note that no intermediate court opinion has ever repudiated the doctrine.

Unless litigants are afforded some relief in cases where a trial in Texas would be grossly unfair, it is not far-fetched to imagine that the following ditty might become the number one hit song in Yugoslavia by 1990:

> I cain't prove no Texas Nexus.
>
> I got hurt near home in Zren-Ja-Neen.
>
> Still I filed my suit in Texas.
>
> They ain't got no *forum non conveen* [sic].

(With apologies to George Strait and the author of "All My Exes Live in Texas," and with credit to lyricist/briefing attorney Kate Hall of this Court.)

I respectfully dissent.

APPENDIX 3

Order of the 61st Judicial District Court of Harris County, Texas dismissing on the basis of forum non conveniens

No. 84-17,171

DOMINGO CASTRO ALFARO, et al.,	§	
	§	IN THE
	§	DISTRICT
Plaintiffs,	§	COURT
	§	
v.	§	OF HARRIS
	§	COUNTY, TEXAS
DOW CHEMICAL COMPANY, et al.,	§	61st JUDICIAL
	§	DISTRICT
Defendants.	§	

ORDER OF DISMISSAL

On April 28, 1987, came on before the Court the motions to dismiss for lack of jurisdiction and to dismiss on the basis of forum non conveniens of Dow Chemical Company and Shell Oil Company; and the Court having heard argument of counsel, read the briefs and affidavits filed by all the parties herein; reviewed the responses to discovery on file with the Court; and reviewed the stipulations filed by defendants has determined that the Court has jurisdiction of all the remaining claims asserted herein by that the defendants' motion to dismiss on the basis of forum non conveniens is meritorious and should be granted as to all parties for the reasons stated in the briefs and motions filed herein by the defendants; therefore it is hereby

ORDERED that the claims of Domingo Castro Alfaro; Ismail Campos Alpizar; Ovidio Morera Alvarado; Alvaro Morera Alvarez; Jesus Hernandez Badilla; Edwin Leon

Barboza; Waldemar Loaiza Calvo; Claudio Salazar Carballo; Joel Dinarte Castro; Sergio Zamora Castro; Alcibiades Nunez Caspedes; Miguel Angel Steller Chavas; Didier Arias Elizondo; Gregoria (Gregorio) Perez Espinoza; Francisco Arias Fallas, Rigoberto Garita Garita; Angel Solano Gonzales; Marciano Solano Gonzales; Andres Vega Granados; Juan Figueroa Matarrita; Uriel Nunez Moya; Eli Ordonez Murillo; Ismael Salas Nunez; Jorge Vega Perez; Francisco Ramirez Ramirez; Vicente Guevara Reyes; Gerardo Espinoza Rodriguez; Daniel Zumbado Sales; Mario Zumbado Salas; Ruben Morales Salazar; Abelino Rojas Sequeira; Jose Sibaja Sota; Elei Elizondo Umana; Juan Elizondo Umana; and Manuel Flores Valverde; are dismissed as to all parties under the doctrine of forum non conveniens subject to: (1) the stipulations filed herein by Dow Chemical Company and Shell Oil Company and (2) to this case being refiled if the defendants do not comply with the terms of those stipulations. The above-named plaintiffs, citizens of Costa Rica, shall hereafter have the right to proceed with this litigation, if they choose to do so, in Costa Rica where the causes of action arose. All pending motions not expressly granted herein are denied. Limitations statutes tolled having pendency of this case in this court. [sic]

SIGNED AND ENTERED at Houston, Texas this 22 day of June, 1987.

/s/ Shearn Smith
JUDGE PRESIDING

APPROVED AS TO FORM AND SUBSTANCE:

SHELL OIL COMPANY

By: /s/ Burt Ballanfant
Burt Ballanfant
Bar No. 1647000
Room 4794
One Shell Plaza
P. O. Box 2463
Houston, TX 77252

By: /s/ Jose A. Berlanga
Jose A. Berlanga
Bar No. 02203400
Room 4708
One Shell Plaza
P. O. Box 2463
Houston, TX 77252

DOW CHEMICAL COMPANY

By: /s/ F. Walter Conrad
F. Walter Conrad
Bar No. 04709000
3000 One Shell Plaza
Houston, TX 77252

APPROVED AS TO FORM ONLY:

PLAINTIFFS

By: /s/ Charles S. Siegel
Charles S. Siegel
Bar No. 18341875
8333 Douglas
Dallas, TX 75225

APPENDIX 4

Order of the Texas Supreme Court Dated May 2, 1990, Overruling Motion for Rehearing and Dissenting Opinion on Motion for Rehearing.

ORDERS OF THE SUPREME COURT OF TEXAS Pronounced May 2, 1990

* * *

ORDERS ON MOTIONS

THE FOLLOWING MOTIONS FOR REHEARING OF CAUSES ARE OVERRULED:

* * *

C-7743. DOW CHEMICAL COMPANY AND SHELL OIL COMPANY v. DOMINGO CASTRO ALFARO ET AL.: from HARRIS County; 1st district (01-87-00700-CV. 751 SW2d 208, 03-24-88); as supplemented; with Dissenting Opinion on Rehearing by Chief Justice Phillips joined by Justice Gonzalez, Justice Cook and Justice Hecht

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IN THE SUPREME COURT OF TEXAS

NO. C-7743

DOW CHEMICAL COMPANY AND SHELL OIL COMPANY, Petitioners, v. DOMINGO CASTRO ALFARO ET AL., Respondents.	§ § § § § § § § §	FROM HARRIS COUNTY FIRST DISTRICT

DISSENTING OPINION ON MOTION FOR REHEARING

During the pendency of the motion for rehearing in this cause, this court made a decision which I believe conflicts squarely with our opinion here. Our amendment of Texas Rule of Appellate Procedure 140, in my view, is based on a statutory interpretation which is incompatible with our construction of Section 71.031 of the Texas Civil Practice and Remedies Code.

Rule 140, effective September 1, 1990, will provide that the Supreme Court may decline to exercise jurisdiction over a direct appeal for several reasons, including instances where "the case is not of such importance to the jurisprudence of the state that a direct appeal should be allowed." Tex. R. App. P. 140(b) (eff. Sept. 1, 1990). Although this rule and its predecessor rule of civil procedure (Tex. R. Civ. P.499a) have been in existence since 1943, this court has never before, either by rule or opinion, asserted that its jurisdiction over direct appeals was discretionary. *See generally* Wicker, *Direct Appeals to the Supreme Court*, 32 Texas Practice – Civil Trial and Appellate Procedure 97-102 (1985). The statute authorizing such appeals is, like the statute authorizing wrongful death actions, couched in terms of what a party "may" do. Section 22.001(c) of the Texas Government Code (formerly Article 1738a, Tex. Rev. Civ. Stat.) provides:

> An appeal *may be taken* directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state. It is the duty of the supreme court to prescribe the necessary rules of procedure to be followed in perfecting the appeal.[1]

---

[1] This statute is authorized by Article V, section 3-b of the Texas Constitution.

(Emphasis added).

Our posture is thus that a district judge *may not* decline to exercise jurisdiction on common law procedural grounds because a plaintiff who "may" bring an action under Section 71.031 of the Texas Civil Practice and Remedies Code has the absolute right to select the forum. On the other hand, this court *may* decline to exercise jurisdiction in a direct appeal on purely discretionary grounds, even though Section 22.001 of the Texas Government Code provides that an appeal "may be taken" under certain conditions. Is there a principled rationale for this distinction? I can find none. If "may" is mandatory in one instance, it should be mandatory in the other. Is this court entitled to an exemption from statutory mandates because of its importance, its superior wisdom, or its crowded docket? Or does legislative direction mean one thing to this court in March, something else in April, and back again in May, reducing our decisions, in Justice Roberts' lament, to nothing but "a restricted railroad ticket, good for this day and train only"? *Smith v. Allwright*, 321 U.S. 649, 669, 64 S.Ct. 757, 768, 88 L.Ed. 987, 1000 (1944) (Robert, J., dissenting).

For this additional reason, I would grant petitioners' motion for rehearing.

/s/ Thomas R. Phillips
Thomas R. Phillips
Chief Justice

OPINION DELIVERED: May 2, 1990

Justices Gonzalez, Cook and Hecht join in this dissenting opinion.

APPENDIX 5

Order and Judgment of the Texas Supreme Court in Dow Chemical Co. and Shell Oil Co. v. Domingo Castro Alfaro et al., No. C-7743 (Tex. March 28, 1990)

ORDERS OF THE SUPREME COURT OF TEXAS Pronounced March 28, 1990

ORDERS ON CAUSES

C-7743. DOW CHEMICAL AND SHELL OIL COMPANY V. DOMINGO CASTRO ALFARO ET AL.; from HARRIS County; 1st district (01-87-00700-CV, 751 SW2d 208, 03-24-88)

The judgment of the court of appeals is affirmed

Opinion by Justice Ray
Concurring Opinion by Justice Hightower
Concurring Opinion by Justice Doggett
Dissenting Opinion by Chief Justice Phillips
Dissenting Opinion by Justice Gonzalez
Dissenting Opinion by Justice Cook
Dissenting Opinion by Justice Hecht

THE SUPREME COURT OF TEXAS

NO. C-7743

DOW CHEMICAL COMPANY AND SHELL OIL COMPANY, Petitioners	)	FROM HARRIS COUNTY, FIRST DISTRICT
vs.	)	
DOMINGO CASTRO ALFARO ET AL., Respondents	)	

JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on writ of error to the Court of Appeals for the First District, and having considered the appellate record and the argument of counsel, is of the opinion that the judgment of the court of appeals should be affirmed.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) Because we conclude that the legislature has statutorily abolished the doctrine of forum non conveniens in suits brought under section 71.031 of the Texas Civil Practice and Remedies Code, we affirm the judgment of the court of appeals.

2) Domingo Castro Alfaro et al. shall recover from Dow Chemical Company and Shell Oil Company, which shall pay, the costs in this Court and in the court of appeals.

A copy of this judgment and of the Court's opinion is certified to the court of appeals and to the District Court of Lubbock County, Texas for observance.

(Opinion of the Court delivered by Justice Ray)
(Concurring Opinion by Justice Hightower)
(Concurring Opinion by Justice Doggett)
(Dissenting Opinion by Chief Justice Phillips)
(Dissenting Opinion by Justice Gonzalez)
(Dissenting Opinion by Justice Cook)
(Dissenting Opinion by Justice Hecht)

March 28, 1990

* * *

APPENDIX 6

Order Granting Extension of time to file Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

NO. A-862

Dow Chemical Company and Shell Oil Company,

Petitioners

v.

Domingo Castro Alfaro, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including August 30, 1990.

/s/ Byron R. White
Associate Justice of the
Supreme Court of the
United States

Dated this 4th
day of June, 1990.

APPENDIX 7

Dow Chemical Company's Parents, subsidiaries and Affiliates

Pursuant to Supreme Court Rule 28.1, Dow Chemical Company is the sole parent company and has an ownership interest in the following subsidiaries or affiliates:

The Dow Chemical Company

- Admiral Equipment Co.
- Admiral Equipment Japan Ltd.
- Arabian Chemical Company Limited
- Boride Products, Inc.
- Cayuse Pipeline, Inc.
- CD Medical, Inc.
  - CD Home Dialyservice, Inc.
  - CD Medical International Ltd.
- Compagnie des Services Dowell Schlumberger (2)
- DCOMCO, Inc.
- DCU/LB TRUST (1)
- Destec Energy inc.
  - Alamo Land Company Inc.
  - Destec Ventures, Inc.
  - Louisiana Gasification Technology, Inc.
  - PSE Inc.
- Desco Polymers (1)
- Dofinco Inc.
- Dow A.g.
  - Donichem Chemical KFT (1)
  - Dow Benelux Holding N.V.
    - Dow Benelux N.V.
      - CD Medical B.V.
    - Polyol International B.V.
      - Polyol Belgium N.V.
  - Dow Belgium
    - Dow International Service Center (3)
  - Dow Chemical Iberica S.A.
    - DowBrands Espanola S.A.

Transformadora de Etileno S.A. (1)
Dow Danmark A/S
Dow Europe S.A.
Chimtrade (1)
Dow Export S.A.
Vorakim Kimya Sanayi
Ve Ticaret A.S. (5)
Dow Hellas A.E.
Dow International Service Center (3)
Dow Norge A/S
Vorakim Kimya Sanayi Ve Ticaret A.S. (5)
Dow Austria GmbH
Dow Chemical (Australia) Limited
Dow Chemical Canada Inc.
Dow Capital B.V.
Dow Pipeline Ltd.
DowBrands Canada Inc.
Maligne Resources Ltd.
Dowell Schlumberger Canada Incorporated (2)
Fort Saskatchewan Ethylene Storage Limited Partnership (1)
H-D Tech Inc. (1)
Wabiskaw Explorations Ltd. (1
Dow Chemical (China) Ltd.
Dow Chemical Company Limited
Cromarty Petroleum Company Limited (1)
Dow Trading, Ltd.
Dow Chemical Delaware Corporation
Chief Shipping Company (12
Dow Chemical (Hong Kong) Limited
Dow Chemical Inter-American Limited
Dow Quimica de Columbia S.A. (10
Dow Chemical International Inc. (Panama)
Dow Chemical International Ltd.
Chief Shipping Company (12)
Dow Portugal Produtos Quimicos, Lda (14)
Petroquimica-Dow S.A.
Dow Chemical Japan Limited
Dow Chemical (NZ) Ltd.

Dow Chemical Overseas Capital N.V.
Dow Chemical Pacific Limited
Ulsan Pacific Chemical Company Ltd.
Dow Chemical (Singapore) Private Limited
Dow CHemical Taiwan Ltd.
Dow Chemical Thailand Limited
Dow Corning Corporation (2)
Dow Credit Corporation
Dow Deutschland Inc.
Dow Rheinmuenster GmbH
Dow Ahlen GmbH
Dow Service GmbH (6)
DowBrands Europe GmbH
Dow Stade GmbH
Dow Service GmbH
Dow Vertriebsgesellschaft mbH
Dow Pflanzenschutz GmbH
Dow Service GmbH (6)
Impatex A.G.
Epoxital (1)
Dow Engineering Company
Dow Engineering Inc.
Dow Factoring Company S.A.
Dow France S.A.
Dow International B.V.
Dow Intrastate Gas Company
Dow Italia S.p.A.
First Chemical Factoring S.p.A.
Oronzio de Nora Technologies S.p.A. (1)(9)
Dow Kakoh Kabushiki Kaisha
Dow Kenya, Ltd.
Dow Mitsubishi Kasei Limited (1)
Dow Plastics Development A.G.
Dow Portugal Produtos Quimicos, Lda (14)
Dow Quimica Argentina S.A.
Dow Quimica Chilena S.A.
Anticorrosives Industriales Ltda (1)
Dow Quimica de Colombia S.A. (10)
Dow Quimica Mexicana, S.A. de C.V.
Terminalex Maritimas, S.A. de C.V.

Dow Quimica S.A.
Dow Produtos Quimicos Ltda. (13)
Mineracao e Quimica do Nordesic S.A.
Spuma Pac-Industria e Cornericio dc Embalagens e Artcfatos Plasticos Ltda (4)
Family Corn. c Ind. de Produtos de Limpeza Ltda. (1)
Merrell Lepetit Farmaceutica Ltda.
Propenasa Comercial Eportadora S.A.
Spuma Pac-Industria e Comercio dc Embalagens e Artefatos Plasticos Ltda (4)
Bramevik Comercio e Participacoes Ltda
Dow Quimica Venezuela C.A.
C.V. Services Ltd.
Dow Suomi OY
Dow Sverige A.B.
Dow Trading S.A.
Dow - United Technologies Composite Products Inc. (1)
Dow Uretanos S.A.
DowBrands Inc.
DowBrands France S.A.
Dowell Schlumberger Corporation (2)
Dowell Schlumberger (2)
El Dorado Terminals Company (1)
Essex Chemical Corporation
Essex Vencap, Inc.
Pioneer Pharmaceuticals, Inc.
Essex Specialty Products, Inc.
Gurit-Essex, A.G. (2)
Mortell Company

Etoxilados Del Plata S.A. (1)
FilmTec Corporation
Great Western Pipeline Company, Inc.
Haeger and Kaessner do Brasil Produtos Quimicos Ltda.
Joliet Marine Terminal Trust Estate (1)
Latin American Pharmaceuticals, Inc.
Laboratorios Lepetit de Mexico S.A. de C.V.
Lepetit International Inc.
Lepetit S.A.
Merrell Dow Argentina S.A.
Merrell Dow Venezuela, C.A.
Merrell S.A.
Liana Limited
Dorinco Reinsurance Company
Dorintal Reinsurance Limited
United AgriSeeds, Inc.
Eurosemences, S.A.
DowElanco B.V.
DowElanco Danmark A/S
DowElanco Argentina S.A.
DowElanco (Australia) Limited
DowElanco Canada Inc.
DowElanco Chile S.A.
DowElanco GmbH
DowElanco Iberica S.A.
DowElanco Italia S.r.L.
DowElanco Limited
DowElanco Mexicana S.A. de C.V.
DowElanco P.V. GmbH
DowElanco Pacific Ltd.
DowElanco S.A.
DowElanco Sverige A.B.
DowElanco Tarim S.A.
Ivon Watkins - Dow Limited
Generon Systems (1)
Generon Systems AG (1)
Rofan Energy Inc.
Scotdril Offshore Company (1)
Servitecnia S.A.

Taiwan Dow Chemical Limited
Tecnica Petroquimica de Centro America S.A.
Tepeca, S.A.
The Cynara Company (8)
Transpak Industries Limited
Vorakim Kimya Sanayi Ve Ticaret A.S. (5)
Zip Pak Incorporated

APPENDIX 8

Shell Oil Company's parents, subsidiaries, and affiliates

Pursuant to Supreme Court Rule 28.1, Shell Oil Company is a wholly owned subsidiary of SPNV Holdings, Inc., a Delaware corporation. SPNV Holdings, Inc. is a wholly owned subsidiary of Shell Petroleum N.V., a Netherlands Company. The voting shares of Shell Petroleum N.V. are owned 60% by Royal Dutch Petroleum Company, The Hague, The Netherlands, and 40% by The "Shell" Transport and Trading Company, p.l.c., London, England. Royal Dutch Petroleum Company and The "Shell" Transport and Trading Company, p.l.c. are holding companies which together directly or indirectly own securities of companies in the Royal Dutch/Shell Group, the members of which are severally engaged throughout the greater part of the world in one or more phases of the oil, chemical, coal, nuclear energy and metals industries. The following list names the companies in which Shell or its subsidiary has an ownership interest.

SHELL OIL COMPANY

(Subsidiary and Affiliate* Companies)

AP Shipping Corporation
Argus Realty Service Inc.
Asiatic Petroleum Corporation
Florida Coal Gasification Inc.
Houston Fuel Oil Terminal, Inc.
Nickerson American Plant Breeders Inc.
    Agripro Biosciences Inc.
Pecten Arabian Company
    Pecten Middle East Services Company
        Pecten Chemicals Inc.

Pico Limited
Pecten Export Corporation
Pecten Trading Company
Oil Companies Institute for Marine Pollution Compensation Limited*
Royal Lubricants Company, Inc.
Scallop Liquified Natural Gas, Inc.
Shell Agricultural Chemical Company
Shell Capital, Inc.
Shell Communications, Inc.
Shell Credit, Inc.
Shell Finance Company
Shell Leasing Company
Shell Energy Resources Inc.
Shell Energy Company
Pecten International Company
Pecten Algeria Company
Pecten Argentina Company
Pecten Ash Sham Company
Pecten Bahamas Company
Pecten Belize Company
Pecten Brazil Alagoas Company
Pecten Brazil Alagoas Petroleum Company
Pecten Brazil Amazon Company
Pecten Brazil Amazon Exploration Company
Pecten Brazil Amazon Exploration and Development Company
Pecten Brazil Amazon Petroleum Company
Pecten Brazil Bahia Company
Pecten Brazil Bahia Exploration Company
Pecten Brazil Bahia Exploration and Development Company
Pecten Brazil Bahia Petroleum Company
Pecten Egypt Exploration Company
Pecten Brazil Exploration Company
Pecten Brazil Marajo Company
Pecten Brazil Maranhao Company

Pecten Brazil Maranhao Exploration Company
Pecten Brazil Petroleum Company
Pecten Brazil Rio Grande Do Norte Company
Pecten Cameroon Company
Pecten Canada Limited
Pecten Chile Company
Pecten Ecuador Company
Pecten Egypt Offshore East Company
Pecten Egypt Offshore West Company
Pecten Guinea-Bissau Company
Pecten Guinea-Bissau Exploration Company
Pecten Malaysia Company
Pecten Malaysia Petroleum Company
Pecten Niugini Company Limited
Pecten Orient Company
Pecten Overseas Petroleum Company
Pecten Paraguay Company
Pecten Portugal Company S.A.R.L.
Pecten Potiguar Company
Pecten Santos Company
Pecten Santos Exploration Company
Pecten Santos Petroleum Company
Pecten Sarawak Company
Pecten Somalia Company
Pecten Suriname Company
Pecten Syria Company
Pecten Syria Gas Company
Pecten Syria Petroleum Company
Al Furat Petroleum Company*
Pecten Tanzania Company
Pecten Tunisia Company
Pecten Trinidad Company

Pecten Victoria Company
Pecten Vietman Company
Taranaki Offshore Petroleum Company
Taranaki Offshore Petroleum Company Limited
Shell Gas Pipeline Company
Shell Gas Trading Company
Shell LNG Company
Shell LNG Trading Company
Shell Mining Company
Bellaire Trucking Company
Billiton Metals Inc.
Encoal Corporation
Marrowbone Development Company
Big Beaver Coal Company
Pecten Coal International Inc.
R. & F. Coal Company
Shell Coal and Terminal Company
Clipper Coal Corporation
East Kentucky Energy Corporation
Kermit Coal Company
Shipyard River Coal Terminal Company
Triton Coal Company
Turris Coal Company
Shell Offshore Inc.
SOI Royalties Inc.
Shell Western E&P Inc.
Belridge Farms
Belridge Packing Co.
Choctaw Pipe line Company
Mabee Petroleum Corp.
Shell Cortez Pipeline Company
Cortez Capital Corporation*
Shell Michigan Pipeline Company
Shell Western Pipeline Inc.
SWEPI Royalties Inc.
East Texas Salt Water Disposal Company*

- Grande Ecallie Land Company, Inc.*
- Van Salt Water Disposal Company*
- WIDC (Wyoming Industrial Development Corporation)*

Shell Export Company
Shell Investment, Inc.
Shell Motorist Club, Inc.
Shell Pipe line Corporation

- Butte Pipe Line Company
- Shell California Pipeline Company
- Dixie Pipeline Company*
- Explorer Pipeline Company*
- LOCAP, Inc.*
- Olympic Pipe Line Company*
- Plantation Pipe Line Company*
- West Shore Pipe Line Company*
- Wolverine Pipe Line Company*

Shell Polymers and Catalysts Enterprises Inc.

- Ardyne Inc.
- Compositek Corporation
- CRI International, Inc.*
  - CRI Far East Trading Company Limited*
  - CRI Real Estate, Inc.
    - CRI-SAM Ltd.
  - Catalyst Recovery of Louisiana, Inc.
  - Catalyst Technology U.K. Limited
    - Catalyst Technology Germany
    - Time Safety Products U.K., Ltd.*
- Nippon-CRI, Ltd*
- Catalyst Clearing House, Inc.

CRI Ventures, Inc.*
- Catalyst Recovery Canada, Ltd.
- CT Bolting Products & Services, Inc.
- Total Inert Maintenance & Equipment, Inc.
- Catalyst Technology, Inc.
  - Catalyst Technology (Canada) Ltd.
- Total Inert Maintenance & Equipment of Canada, Ltd.
- Time Safety Products, Inc.
- Catalyst Technology France

CRI Investment Corporation
- CRI Europe S.A.
- Catalyst Recovery Europe, S.A.

Time Safety Products, U.K., Ltd.*

CRI Metal Products, Inc.
Criterion Catalyst Company*
CRI Ventures, Inc.*
Morrison Molded Fiber Glass Company
Premix/E.M.S. Inc.
Rampart Packaging Inc.
Triton Biosciences Inc.
Fractionation Research, Inc.*
GRAVCAP, Inc.*
Heat Transfer Research, Inc.*
Inland Corporation*

Loop, Inc.*
Lucky Chance Mining Company, Inc.*
Mesbic Financial Corporation of Houston*
NCUBE*
Oil Companies Institute for Marine Pollution Compensation Limited*
Oil Insurance Limited*
United Scientific Inc.*

APPENDIX 9

I

NAMES OF ALL PARTIES

Domingo Castro Alfaro
Ismail Campos Alpizar
Ovidio Morera Alvarado
Alvaro Morera Alvarez
Jesus Hernandez Badilla
Edwin Leon Barboza
Waldemar Loaiza Calvo
Claudio Salazar Carballo
Joel Dinarte Castro
Sergio Zamora Castro
Alcibiades Nunez Cespedes
Miguel Angel Steller Chaves
Didier Arias Elizondo
Gregoria Perez Espinoza
Francisco Arias Fallas
Rigoberto Garita Garita
Angel Solano Gonzales
Marciano Solano Gonzalez
Andres Vega Granados
Juan Figueroa Matarrita
Uriel Nunez Moya
Eli Ordonez Murillo
Ismael Salas Nunez
Jorge Vega Perez
Francisco Ramirez Ramirez
Vicente Guevara Reyes
Gerardo Espinoza Rodriguez
Daniel Zumbado Salas
Mario Zumbado Salas
Ruben Morales Salazar
Abelino Rojas Sequeira
Jose Sibaja Soto
Elei Elizondo Umana
Juan Elizondo Umana
Manuel Flores Valverde

APPENDIX 10

Excerpts From Dow Chemical Company's Motion for Rehearing before the Court of Appeals for the First Supreme Judicial District of Texas at Houston

C. The majority's interpretation of § 71.031 destroys defendants' due process guarantees.

1. The majority's decision subjects § 71.031 to "well-deserved due process attacks."

As the dissenting opinion cognizantly portends, the majority's decision will inevitably result in "well-deserved due process attacks" upon § 71.031. This is so because the statute – as interpreted by the majority – would never permit a dismissal under the doctrine of forum non conveniens, no matter how inconvenient a forum Texas may be for the defendant, or how basically unfair the maintenance of the action against the defendant might be.

The due process clause of the Fourteenth Amendment prohibits states from asserting jurisdiction over defendants if that assertion would offend the "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158 (1945). The hallmarks of due process are fairness and reasonableness to the defendant. *Kulko v. Superior Court of California*, 436 U.S. 84, 92, 98 S.Ct. 1690, 1697 (1978).

The court will recall that plaintiffs' counsel at oral argument was asked whether his interpretation of § 71.031 would preclude forum non conveniens dismissal in every case brought under the statute. He stated that it would, with the possible exception being a case where the defendant's due process rights were implicated.

Clearly, if the statute as the majority has interpreted it would deprive any defendant of due process, it cannot and will not withstand constitutional scrutiny.

The Supreme Court has held that due process considerations dictate that jurisdiction over a defendant should not operate to make litigation so gravely difficult and inconvenient that the defendant is unfairly at a severe disadvantage in comparison to the plaintiff. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 2185 (1985).

It is clear in this case that defendants' inability to join proper third parties or to do necessary discovery fundamental to their defense puts them at a distinct and severe disadvantage in comparison to plaintiffs;[4] indeed, that

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[4] The court will recall that plaintiffs' counsel has admitted that not all of plaintiffs' treating doctors will be available for examination by defendants. Additionally, there is no assurance that all of plaintiffs' medical records will be produced, or that all pertinent records from plaintiffs' Costan Rican employer will be produced. Plaintiffs have no control over these persons or their documents; a Texas court cannot compel them to testify or to produce documents; and defendants have no independent means to acquire that testimony or to compel production of those documents. Furthermore, it is highly unlikely that a Texas court would be able to obtain personal jurisdiction over any Costa Rican third parties that should be joined in the lawsuit. These factors, and others, would put defendants at a distinct disadvantage relative to plaintiffs if the case were tried in Texas. For instance, plaintiffs would be able to rely upon only the most favorable physicians' testimony and records, without plaintiffs' full medical history being examined. Further, plaintiffs are obviously familiar with the site and mechanism of their alleged exposure; there is no assurance that

(Continued on following page)

disadvantage constitutes a deprivation of due process. The meaning that this court has ascribed to § 71.031 would prevent the trial court from acting to prevent that injustice. Moreover, even if the court were to find no due process violation in this case, the mere potential for such a situation simply supports defendants' contention that this statute cannot be interpreted – in conformity with the sound principles of due process – as this court has interpreted it.

2. The majority's decision will have an adverse effect on personal jurisdiction determinations

Not only will the majority's interpretation of § 71.031 result in due process attacks upon that statute, it will likewise result in increased challenges to Texas courts' exercise of personal jurisdiction over potential defendants.

In *Asahi Metal Industry Co. v. Superior Court of California*, 107 S.Ct. 1026 (1987), the Supreme Court addressed

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(Continued from previous page)

defendants or their representatives would be granted access by plaintiffs' employer to the site of the alleged exposures. Thus defendants' understanding of the mechanism of the alleged exposure likely will be severely compromised relative to plaintiffs. Finally, the probability that defendants will be unable to join as parties defendant those persons or entities who may have been responsible for the construction and sale of the injector devices apparently used by plaintiffs would further disadvantage defendants in that they would be unable to compel any information from those parties, and would be unable to seek contribution from those parties in the unlikely event that a judgment is rendered against defendants.

the propriety of the State of California's exercise of personal jurisdiction over a Japanese corporation that had few contacts with the state. The Court acknowledged that even in situations where the defendant had engaged in purposeful activities in the forum state, due process required that the Court consider several additional factors. The Court concluded that if the evaluation of those factors lead to the conclusion that the assertion of jurisdiction would be unreasonable, due process required that California refrain from exercising that jurisdiction. The Court found that although the defendant in *Asahi* had minimum contacts with California, the consideration of the other factors dictated that jurisdiction could not be fairly exercised over the defendant.

Justice Brennan, writing in concurrence, and quoting from his opinion in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78, 105 S.Ct. 2174, 2185 (1985), noted that:

> This is one of those rare cases in which "minimum requirements inherent in the concept of 'fair play and substantial justice' . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities."

Id. at 1035. In *Burger King*, Justice Brennan had written that as an alternative to a jurisdictional challenge, a defendant who had "minimum contacts" with the forum, but who was claiming substantial inconvenience, could "seek a change of venue," referring to 28 U.S.C. § 1404(a), the venue transfer statute, which "embodies in an expanded version the common law doctrine of forum non conveniens." *Id.* at 2185 n. 20. Thus the Supreme Court

apparently views forum non conveniens transfer or dismissal as a kind of "safety valve" that prevents otherwise well-founded due process challenges to personal jurisdiction. *See also* Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 S. Cal. L. Rev. 913, 922-23 (1985). If, however, a jurisdiction has rejected forum non conveniens, the "rare" due process challenge such as that in *Asahi* will become commonplace in that jurisdiction in order to prevent egregious inconvenience to defendants. Thus this court's elimination of the doctrine of forum non conveniens will no doubt have unintended far reaching implications in the area of personal jurisdiction.

APPENDIX 11

Excerpts from Shell Oil Company's Motion for Rehearing before the Court of Appeals for the First Supreme Judicial District of Texas at Houston

POINT OF ERROR NUMBER FOUR

The majority opinion of this court erred in interpreting § 71.031 as absolute because such an interpretation makes the statute unconstitutional as applied in this case.

ARGUMENT AND AUTHORITIES

The modern trend of the law has been to expand jurisdiction. See, *International Shoe Company v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945). This extension of jurisdiction has been balanced by the expansion of the use of the doctrine of forum non conveniens. The majority opinion by adopting an absolute rule for Texas as to forum non conveniens for all types of claims by all foreign claimants has acted in such a way as to have caused § 71.031 to become unconstitutional as violative of the due process clause of the Constitution.

At the time that this expansion of jurisdiction began to occur in the United States, the United States Supreme Court expressed concern that the due process clause and equal protection clauses of the fourteenth amendment as well as the commerce clause of the United States Constitution were being violated in some cases. Based upon such concerns it held a statute authorizing service against any agent soliciting business in a state unconstitutional as

violating the commerce clause. See, *Davis v. Farmers Cooperative Equity Co.*, 262 U.S. 312, 43 S. Ct. 556, 67 L.Ed. 996 (1923); and *Michigan Cent. R. Co. v. Mix*, 278 U.S. 492, 49 S. Ct. 207, 73 L.Ed. 470 (1929). Subsequently as states adopted the doctrine of forum non conveniens such constitutional concerns as a practical matter became less pressing. Indeed the United States Supreme Court has specifically left this issue open in *Hughes v. Fetter*, 341 U.S. 609, 612-614, 71 S. Ct. 980, 983, 95 L.Ed. 1212, 1217 (1951), where the court said:

> "The Wisconsin policy, moreover, cannot be considered as an application of the forum non conveniens doctrine, whatever effect that doctrine might be given, if its use resulted in denying enforcement to public acts of other states. Even if we assume that Wisconsin could refuse, by reason of particular circumstances, to hear foreign controversies to which nonresidents were parties, the present case is not one lacking a close relationship with the state."

The precedent, which would be established by the 2-1 ruling of this panel that § 71.031 provides an absolute "open forum" in Texas for claims by alien claimants arising outside of the United States, construes that statute in such a way that it violates the equal protection and due process clauses of the fourteenth amendment to the United States Constitution. As correctly noted by Justice Duggan's dissent, such an interpretation violates Shell's right to due process. That deprivation is based on the different procedural posture in which the parties are placed. Shell and Dow will be subject to the full discovery granted to parties under the Texas Rules of Civil Procedure. This is in stark contrast with the limitations placed on the defendants discovery due to the lack of

compulsory process and the probability that depositions of non parties could not even be taken in Costa Rica. See, Affidavit of Rodrigo Blanco Fernandez, p. 4, Tr. p. 690.

This discriminating access to proof leads to the prospect that an erroneous result would be reached if this case were tried in Texas. The principles of due process are a constitutional guarantee against erroneous deprivation of property. See, *Mackey v. Montrym*, 443 U.S. 1, 99 S. Ct. 2612, 61 L.Ed.2d 321 (1979). Recent cases by the United States Supreme Court have eroded unfettered application of jurisdiction. In *Asahi Metal Ind. Co. v. Superior Court*, ___ U.S. ___, 107 S. Ct. 1026, 94 L.Ed.2d 92 (1987) eight of nine justices agreed that even where a defendant had "minimum contacts" sufficient to establish jurisdiction, due process may nevertheless prevent such exercise of jurisdiction: (1) where the burden on the defendant is too great, (2) the presence or absence of interest of the forum state and (3) the plaintiff's interest in obtaining relief; plus the interstate judicial system interest in obtaining the most efficient resolution of the controversies.

In this case Shell was (1) not a resident of Texas at the time this product was sold, Tr. p. 285; (2) this product was manufactured in locations other than in Texas, Tr. p. 284; (3) Shell had sold the business (agricultural chemicals) at the time of the hearing on the motion for forum non conveniens, Tr. p. 289; (4) few if any of the employees having knowledge as to Shell's DBCP product were still in Houston; (5) the action arose in Costa Rica; and (6) the plaintiffs were all residents of Costa Rica. Shell submits that on the record of this case that these facts fall within the concurrence of Justice Brennan in *Asahi Metal Industries v. Superior Court, supra* at 1035:

> "This is one of those cases in which "minimum requirements inherent in the concept 'of fair play and substantial justice' . . . defeat the reasonableness of jurisdiction even [when] the defendant has purposefully engaged in forum activities."

This language should be viewed in light of Justice Brennan's opinion in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 1274, 85 L.Ed. 528 (1985) where Justice Brennan said:

> On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other consideration would order jurisdiction unreasonable.
>
> • • •
>
> Fn. 20 See, e.g. 28 U.S.C. § 1404(a) [28 U.S.C. § 1404(a)] . . . This provision embodies in an expanded version, the common law doctrine of forum non conveniens. . . . "

This review of the most recent cases by the United States Supreme Court shows that it is the very availability of the doctrine of forum non conveniens perceived by the United States Supreme Court which permits states to assert jurisdiction to the extent currently allowed. This is because the presence of the forum non conveniens doctrine permits courts to decline to exercise jurisdiction where concepts of fair play and substantial justice would be violated by exercising jurisdiction.

This is such a case; accordingly, the interpretation of § 71.031 by this court as an absolute statute instead of a permissive statute as intended by the legislature and as

so interpreted for over fifty-years by Texas courts would render the statute unconstitutional as interpreted and applied in this case. Therefore, Shell requests this court to reconsider its opinion to avoid such an unconstitutional result.

APPENDIX 12

Excerpts from Dow Chemical Company's Application for Writ of Error to The Supreme Court of Texas

D. The court of appeals' interpretation of § 71.031 destroys defendants' due process guarantees.

1. The court of appeals' decision subjects § 71.031 to "well-deserved due process attacks."

As Justice Duggan's dissenting opinion cognizantly portends, the majority's decision would inevitably result in "well-deserved due process attacks" upon § 71.031. This is so because the statute – as interpreted by the majority – would never permit a dismissal under the doctrine of forum non conveniens, no matter how inconvenient a forum Texas may be for the defendant, or how basically unfair the maintenance of the action might be.

The due process clause of the Fourteenth Amendment prohibits states from asserting jurisdiction over defendants if that assertion would offend the "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158 (1945). The hallmarks of due process are fairness and reasonableness to the defendant. *Kulko v. Superior Court of California*, 436 U.S. 84, 92, 98 S.Ct. 1690, 1697 (1978).

The Supreme Court has held that due process considerations dictate that jurisdiction over a defendant should not operate to make litigation so gravely difficult and inconvenient that the defendant is unfairly at a severe disadvantage in comparison to the plaintiff. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 2185 (1985).

It is clear in this case that the inability of Dow and Shell to join proper third parties or to do necessary discovery fundamental to their defense puts them at a distinct and severe disadvantage in comparison to plaintiffs;[5] indeed, that disadvantage constitutes a

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[5] Plaintiffs' counsel has admitted that not all of the plaintiffs' treating doctors will be available for examination by Dow and Shell. Additionally, there is no assurance that all of the plaintiffs' medical records will be produced, or that all pertinent records from the plaintiffs' Costa Rican employer will be produced. Plaintiffs have no control over these persons or their documents; a Texas court cannot compel them to testify or to produce documents, and Dow and Shell have no independent means to acquire that testimony or to compel production of those documents. Furthermore, it is highly unlikely that a Texas court would be able to obtain personal jurisdiction over any Costa Rican third parties that should be joined in the lawsuit. These factors, and others, would put Dow and Shell at a distinct disadvantage relative to the plaintiffs if the case were tried in Texas. For instance, the plaintiffs would be able to rely upon only the most favorable physicians' testimony and records, without the plaintiffs' full medical history being examined. Further, the plaintiffs are obviously familiar with the site and mechanism of their alleged exposure; there is no assurance that Dow and Shell or their representatives would be granted access by the plaintiffs' employer to the site of the alleged exposures. Thus Dow's and Shell's understanding of the mechanism of the alleged exposure likely will be severely compromised relative to the plaintiffs. Finally, the probability that Dow and Shell will be unable to join as parties those persons or entities who may have been responsible for the construction and sale of the injector devices apparently used by the plaintiffs would further disadvantage them in that they would be unable to compel any information from those parties, and would be unable to seek contribution from those parties in the unlikely event that a judgment is rendered against Dow and Shell.

deprivation of due process. The court of appeals' interpretation of § 71.031 would prevent the trial court from acting to prevent that injustice. Moreover, even if the Court were to find no due process violation in this case, the mere potential for such a violation in the future supports the contention of Dow and Shell that this statute cannot be interpreted – in conformity with the sound principles of due process – as the court of appeals has interpreted it.

2. The court of appeals' decision will have an adverse effect on personal jurisdiction determinations.

Not only will the court of appeals' interpretation of § 71.031 result in due process attacks upon that statute, it will also result in increased challenges to Texas courts' exercise of personal jurisdiction over potential defendants.

In *Asahi Metal Industry Co. v. Superior Court of California*, 107 S.Ct. 1026 (1987), the Supreme Court addressed the propriety of the State of California's exercise of personal jurisdiction over a Japanese corporation that had few contacts with the state. The Court acknowledged that even in situations where the defendant had engaged in purposeful activities in the forum state, due process required that the Court consider several additional factors. The Court concluded that if the evaluation of those factors lead to the conclusion that the assertion of jurisdiction would be unreasonable, due process required that California refrain from exercising that jurisdiction. The Court found that although the defendant in *Asahi* had

minimum contacts with California, the consideration of the other factors dictated that jurisdiction could not be fairly exercised over the defendant.

Justice Brennan, writing in concurrence, and quoting from his opinion in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78, 105 S.Ct. 2174, 2185 (1985), noted that:

> This is one of those rare cases in which "minimum requirements inherent in the concept of 'fair play and substantial justice' . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities."

Id. at 1035. In *Burger King*, Justice Brennan had written that as an alternative to a jurisdictional challenge, a defendant who had "minimum contacts" with the forum, but who was claiming substantial inconvenience, could "seek a change of venue," referring to 28 U.S.C. § 1404(a), the venue transfer statute, which "embodies in an expanded version the common law doctrine of forum non conveniens." *Id.* at 2185 n. 20. Thus the Supreme Court views forum non conveniens transfer or dismissal as a "safety valve" that prevents otherwise well-founded due process challenges to personal jurisdiction. *See also* Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 S. Cal. L. Rev. 913, 922-923 (1985). If, however, a jurisdiction has rejected forum non conveniens, the "rare" due process challenge such as that in *Asahi* will become commonplace in that jurisdiction in order to prevent egregious inconvenience to defendants. Thus the court of appeals' elimination of the doctrine of forum non conveniens will no doubt have unintended far reaching implications in the area of personal jurisdiction.

APPENDIX 13

Excerpts from Shell Oil Company's Application for Writ of Error to the Supreme Court of Texas

D. The court erred in interpreting §71.031 as absolute because such an interpretation makes the statute unconstitutional as applied in this case.

The modern trend has been to expand jurisdiction. See, *International Shoe Company v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945). This extension of jurisdiction has been balanced by the use of the doctrine of forum non conveniens. The lower court by adopting an absolute rule as to forum non conveniens even for foreign claimants has caused § 71.031 to become unconstitutional as violative of the due process clause of the Constitution.

As jurisdiction expanded in the United States, the United States Supreme Court expressed concern that the due process clause and equal protection clauses of the fourteenth amendment as well as the commerce clause of the United States Constitution were being violated in some cases. Based upon such concerns it held a statute authorizing service against any agency soliciting business in a state unconstitutional as violating the commerce clause. See, *Davis v. Farmers Cooperative Equity Co.*, 262 U.S. 312, 43 S. Ct. 556, 67 L.Ed. 996 (1923); and *Michigan Cent. R. Co. v. Mix*, 278 U.S. 492, 49 S.Ct. 207, 73 L.Ed. 470 (1929). Subsequently as states adopted the doctrine of forum non conveniens such constitutional concerns diminished. However, the United States Supreme Court has specifically left this issue open in *Hughes v. Fetter*, 341 U.S. 609, 612-614, 71 S. Ct. 980, 983, 95 L.Ed. 1212, 1217 (1951), where the court said:

> "The Wisconsin policy, moreover, cannot be considered as an application of the forum non conveniens doctrine, whatever effect that doctrine might be given, if its use resulted in denying enforcement to public acts of other states. Even if we assume that Wisconsin could refuse, by reason of particular circumstances, to hear foreign controversies to which nonresidents were parties, the present case is not one lacking a close relationship with the state."

As noted by Justice Duggan's dissent, the lower court construction of § 71.031 violates Shell's right to due process. That deprivation is caused by the different procedural posture in which the parties are placed. Shell and Dow will be subject to the full discovery granted to parties under the Texas Rules of Civil Procedure. This is in stark contrast with the limitations placed on the defendants discovery due to the lack of compulsory process and the probability that depositions of non parties could not be taken in Costa Rica. See, Affidavit of Rodrigo Blanco Fernandez, p. 4, Tr. p. 690. The compulsory attendance of witnesses in a civil trial is a vital part of American concepts of due process and equal protection. *Drogaris v. Martine's, Inc.*, 118 So.2d 95 (Fla. 1st DCA, 1960); and *New York v. O'Neill*, 359 U.S. 1, 3 L.Ed.2d 585, 70 S. Ct. 564 (1959).

This discriminatory access to proof leads to the prospect that an erroneous result would be reached if this case were tried in Texas. The principles of due process are a constitutional guarantee against erroneous deprivation of property. See, *Mackey v. Montrym*, 443 U.S. 1, 99 S. Ct. 2612, 61 L.Ed.2d 321 (1979). Recent cases by the United States Supreme Court have eroded unfettered application of jurisdiction. In *Asahi Metal Ind. Co. v. Superior Court*,

___ U.S. ___, 107 S. Ct. 1026, 94 L.Ed.2d 92 (1987), eight of nine justices agreed that even where a defendant had "minimum contacts" sufficient to establish jurisdiction, due process may nevertheless prevent such exercise of jurisdiction: (1) where the burden on the defendant is too great, (2) where the interest of the forum state is limited and (3) the plaintiff's interest in obtaining relief is still protected. A sensible application of forum non conveniens will make it unnecessary to risk the kind of extreme unfairness to the defendant that triggers due process. The United States Supreme Court's decision in *Asahi* was made necessary only because the California courts had not granted defendant's motion for a forum non conveniens dismissal.

In this case Shell was (1) not a resident of Texas at the time this product was sold, Tr. p. 285; (2) this product was not manufactured in Texas, Tr. p. 284; (3) Shell had sold the business at the time of the hearing on the motion for forum non conveniens, Tr. p. 289; (4) few of the employees having knowledge as to Shell's DBCP product were still in Houston; (5) the action arose in Costa Rica; and (6) the plaintiffs were all residents of Costa Rica. Shell submits that the record of this case falls within the concurrence of Justice Brennan in *Asahi Metal Industries v. Superior Court, supra,* at 1035:

> "This is one of those cases in which minimum requirements inherent in the concept 'of fair play and substantial justice' . . . defeat the reasonableness of jurisdiction even [when] the defendant has purposefully engaged in forum activities."

The United States Supreme Court permits states to assert jurisdiction to the extent currently allowed because the presence of the forum non conveniens doctrine permits courts to decline to exercise jurisdiction where concepts of fair play and substantial justice would be violated by exercising jurisdiction because of the lack of compulsory process. The lower court's interpretation of § 71.031 as an absolute statute renders the statute unconstitutional as applied in this case; therefore, Shell believes this court should reverse the lower court's opinion to avoid an unconstitutional result.

APPENDIX 14

Excerpts from Dow Chemical Company's and Shell Oil Company's Motion For Rehearing in the Supreme Court of Texas

VII. Defendant's Due Process Guarantees Will Be Destroyed.

1. Section 71.031, if interpreted to preclude dismissal on the grounds of forum non conveniens in this case, violates petitioners' fourteenth amendment guarantee of due process of law.

As Justice Cook observes in his dissenting opinion, the decision of the Court "allows assertions of personal jurisdiction by Texas courts that are so unfair and unreasonable as to violate the due process clause of the federal constitution." Slip op. at 2 (Cook, J., dissenting). These very concerns were also recognized more than two years ago by Judge Gee, who observed:

> No one can say whether Texas courts will place upon this statute [§ 71.031] the construction . . . that Texas has constituted itself the world's forum of final resort, where suit for personal injury or death may always be filed if nowhere else. . . . *[A]t some point considerations of due process are doubtless implicated when a defendant is required to stand trial at the opposite end of the earth from the location of witnesses, site of the accident, etc.*

Exxon Corp. v. Chick Kam Choo, 817 F.2d 307, 315 & n.8 (5th Cir. 1987) (emphasis supplied), *rev'd on other grounds*, 486 U.S. 140, 108 S. Ct. 1684 (1988).

This Court's opinion neither addresses nor resolves the due process issue raised by petitioners. *See generally* Dow's application for writ of error, 28-36; Shell's application for writ of error, 18-21. Although the concurring opinion of Justice Doggett discusses due process in a footnote, that opinion also fails to meaningfully address petitioners' due process arguments by recasting them in terms of minimum contacts. Minimum contacts, however, is only one component of the due process analysis set forth by the Supreme Court.

2. The "fair play and substantial justice" requirement of due process must be satisfied in addition to the "minimum contacts" requirement.

The due process clause of the Fourteenth Amendment prohibits states from asserting jurisdiction over a defendant unless the defendant has "minimum contacts" with the forum state *and* the exercise of jurisdiction would not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945). The hallmarks of due process are fairness and reasonableness to the defendant. *Kulko v. Superior Court of California*, 436 U.S. 84, 92, 98 S. Ct. 1690, 1697 (1978).

The Supreme Court has made it clear that due process considerations prohibit the exercise of jurisdiction over a defendant if, as in this case, the litigation would be so difficult and inconvenient that the defendant is unfairly at a severe disadvantage in comparison to the plaintiff for numerous reasons. *See infra* pp. 17-19. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct.

2174 (1985), the Supreme Court explained that both the "minimum contacts" and the "fair play and substantial justice" components of the due process analysis must be satisfied before a court may exercise jurisdiction over a defendant consistent with the due process clause of the fourteenth amendment. The Court stated:

> Once it has been decided that a defendant purposely established minimum contacts with the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice."
>
> . . . .
>
> [W]here a defendant who purposely directs his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. . . . Nevertheless, minimum requirements inherent in the concept of "fair play and substantial justice" may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities. As we have previously noted, jurisdictional rules may not be employed in such a way as to make litigation "so gravely difficult and inconvenient" that a party unfairly is at a "severe disadvantage" in comparison to his opponent.

Id. at 476-78 (quoting *International Shoe*, 326 U.S. at 320).

In *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 107 S. Ct. 1026 (1987), the Supreme Court removed any doubt that "fair play and substantial justice" component of due process could defeat the jurisdiction of a trial court, independent of whether, as here, the minimum contacts component of due process was

satisfied. In *Asahi Metal*, the Court addressed the propriety of the State of California's exercise of personal jurisdiction over a Japanese corporation that had few contacts with the state.

The Court unanimously held that even in situations where the defendant had engaged in purposeful activities in the forum state, due process required that the Court consider additional factors to determine whether the exercise of jurisdiction comported with fair play and substantial justice. The Court concluded that if the evaluation of those factors led to the conclusion that the assertion of jurisdiction would be unreasonable, due process required that California refrain from exercising jurisdiction over the defendant. Applying the relevant factors, the Supreme Court held that consideration of fair play and substantial justice dictated that the trial court's exercise of jurisdiction over the defendant in that case would violate due process.

Justice Brennan, writing in concurrence, and quoting from his opinion in *Burger King Corp. v. Rudzewicz* noted that:

> This is one of those rare cases in which "minimum requirements inherent in the concept of 'fair play and substantial justice' . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefuliy engaged in forum activities."

Id. at 116.

It is apparent, therefore, that even if petitioners have allegedly had substantial contacts with Texas, the due process requirement is not satisfied in this case. Instead, as the Supreme Court has made clear, it is also necessary

to determine whether maintenance of this action in the Texas state court would offend traditional notions of fair play and substantial justice and therefore violate due process of law.[1]

3. Absent forum non conveniens, maintenance of this action in Texas would not comport with fair play and substantial justice and would therefore violate petitioners' right to due process of law.

As Justice Brennan explained in *Burger King*, as an alternative to a due process challenge, a defendant who had "minimum contacts" with the forum, but who was claiming substantial inconvenience, could "seek a change of venue," referring to 28 U.S.C. § 1404(a), the venue transfer statute, which "embodies in an expanded version the common law doctrine of forum non conveniens." *Id.* at 478 n.20.[2] Justice Brennan reasoned that, in the

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[1] Plaintiffs and Justice Doggett point out that petitioners have substantial contacts with Texas. Petitioners have never disputed that the minimum contacts component of due process is satisfied in this case. Petitioners' contacts with the forum, however, are only relevant to the first component of the due process analysis, which defendants agree that they meet. Nevertheless, as the Supreme Court has made clear, a defendant who meets the minimum contacts test is subject to the court's jurisdiction only if the "fair play and substantial justice" component of due process is also satisfied. Neither plaintiffs nor Justice Doggett's concurring opinion address this second component of the due process inquiry.

[2] As Justice Cook's dissenting opinion notes, the Supreme Court apparently views forum non conveniens dismissal as a

(Continued on following page)

ordinary case, a change of venue or the doctrine of forum non conveniens could effectively resolve most instances of severe inconvenience, without the necessity of a constitutional due process inquiry. As Justice Brennan explained:

> Most such considerations [of inconvenience] usually may be accommodated through means short of finding jurisdiction unconstitutional. . . . [A] defendant claiming substantial inconvenience may seek a change of venue.

Id. If, however, a jurisdiction has rejected forum non conveniens, as a majority of this Court has done, a due process inquiry is necessary to prevent egregious inconvenience to defendants. Section 71.031 – as interpreted by the majority – would never permit a dismissal under the doctrine of forum non conveniens, no matter how inconvenient a forum Texas may be for petitioners, or how basically unfair the maintenance of the action in a Texas forum might be. This Court's opinion fails to address petitioners' arguments that, absent forum non conveniens, their due process rights would be violated if this case is tried in Texas.

It is well-established that due process requires a fair and impartial trial before a competent tribunal, which includes not only an opportunity to be heard, but also

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(Continued from previous page)

mechanism to "bridge . . . the gap between constitutional doctrines of jurisdiction and problems arising from inconvenient forums" and prevent otherwise well-founded due process challenges to personal jurisdiction. *See also* Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 S. Cal. L. Rev. 913, 922-23 (1985).

a reasonable opportunity to *prepare* for the hearing. *See Johnson v. Mississippi*, 403 U.S. 212, 91 S. Ct. 1778 (1971). Petitioners' due process rights will be compromised because the unavailability of proof can deny to the defendant a meaningful opportunity to be heard. *See* U.S. CONST. amend. XIV, § 1; TEX. CONST. ART. I, § 19. *See also Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191 (1965) (due process includes opportunity to be heard in "a meaningful manner"); *Jordan v. Jordan*, 653 S.W.2d 356, 358 (Tex. App. – San Antonio 1983, no writ) (due process encompasses right to meaningful presentation of proof); *Turcotte v. Trevino*, 499 S.W.2d 705, 723 (Tex. Civ. App. – Corpus Christi 1973, writ ref'd n.r.e.) (due process implies right to present evidence).[3] It is clear in this case

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[3] The "fair trial" factors as applied to these claims by Costa Rican nationals have been described as follows:

> [T]he alleged injuries occurred in Costa Rica. All the Plaintiffs are Costa Rican. Most of the evidence and witnesses are in Costa Rica and none are in [this state] and compulsory process would not be available to compel production of this evidence or the attendance of these witnesses. The cost of obtaining the evidence from Costa Rica would be substantial, if possible. The Defendants would not be able to implead potential third party defendants located in Costa Rica in this action.

Sibaja v. Dow Chemical Co., 757 F.2d 1215, 1217 n.5 (11th Cir.), *cert. denied*, 474 U.S. 948, 106 S. Ct. 347 (1985) (quoting with approval district court's decision). Indeed, every trial court to consider the propriety of these foreign plaintiffs' lawsuits against petitioners in the United States has concluded that trial here would be grossly inconvenient. *See, e.g., Barrantes Cabalceta v. Standard Fruit Co.* 667 F. Supp. 883, 837-38 (S.D. Fla. 1987), *aff'd in part, rev'd in part*, 883 F.2d 1563 (11th Cir. 1989); *Aguilar v. Dow Chemical Co.*, No. 86-4753 (C.D. Cal. 1986).

that the inability of Dow and Shell to join proper third parties or to do necessary discovery fundamental to their defense puts them at a distinct and severe disadvantage in comparison to plaintiffs.

Petitioners will be denied access to sources of proof essential to their defense. Plaintiffs' counsel has admitted that not all of the plaintiffs' treating doctors will be available for examination by Dow and Shell. Additionally, there is no assurance that all of the plaintiffs' medical records will be produced, or that all pertinent records from the plaintiffs' Costa Rican employer will be produced. Plaintiffs have no control over these persons or their documents; a Texas court cannot compel them to testify or to produce documents, and Dow and Shell have no independent means to acquire that testimony or to compel production of those documents. *See* affidavit of Rodrigo Blanco Fernandez, p. 4, Tr. 690. Furthermore, petitioners' defense will be impaired because they will be unable to join third-parties who are not subject to the jurisdiction of the Texas trial court. It is highly unlikely that a Texas court would be able to obtain personal jurisdiction over any Costa Rican third parties that should be joined in the lawsuit.

These factors, and others, would put Dow and Shell at a distinct disadvantage relative to the plaintiffs if the case were tried in Texas. For instance, the plaintiffs would be able to rely upon only the most favorable physicians' testimony and records, without the plaintiffs' full medical history being examined. Further, the plaintiffs are obviously familiar with the site and mechanism of their alleged exposure. In contrast, there is no assurance that Dow and Shell or their representatives would

be granted access by the plaintiffs' employer to the site of the alleged exposures. Dow's and Shell's understanding of the mechanism of the alleged exposure will therefore be severely compromised relative to the plaintiffs. Finally, the probability that Dow and Shell will be unable to join as parties those persons or entities who may have been responsible for the construction and sale of the injector devices apparently used by the plaintiffs would further disadvantage them in that they would be unable to compel any information from those parties, and would be unable to seek contribution from those parties in the event that a judgment is rendered against Dow and Shell.

The sum of these disadvantages plainly deprives petitioners of due process of law. This Court's interpretation of section 71.031 prevents the trial court from acting to prevent that injustice on nonconstitutional grounds. In the event this Court declines to reconsider its interpretation of Section 71.031, it should grant petitioners' motion for rehearing, consider petitioners' due process arguments, and hold that requiring petitioners to defend this action in the Texas state court would deprive petitioners of due process of law.

APPENDIX 15

Sibaja v. Dow Chemical Co., No. 83-1347-CIV-JLK (S.D. Fla. Aug. 25, 1983)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 83-1347-CIV-JLK

SAUL MUNOZ SIBAJA and
RAFAELA ARRIETA PORRAS,
et. al.,

Plaintiffs,

vs.

DOW CHEMICAL COMPANY and
SHELL OIL COMPANY

_____/

ORDER
DISMISSING
CAUSE

THIS CAUSE comes before the Court upon the Defendants' Motions to Dismiss.

In support of their motions to dismiss the Defendants have argued that this cause should be dismissed on the ground of forum non-conveniens. In support of that argument, they have asserted:

1. that each individual plaintiff was allegedly exposed to the product in question in Costa Rica;

2. that the evidence and witnesses, including all of the 58 Plaintiffs, are primarily located in Costa Rica;

3. that most of this evidence and these witnesses would not be subject to the compulsory process of this Court;

4. that even if such evidence and witnesses were made available voluntarily, the cost involved would be substantial;

5. that the witnesses and evidence within the United States are in places other than the Southern District of Florida and so would be just as obtainable in Costa Rica as in Florida;

6. that the Florida law of conflicts would apply the Costa Rican substantive law, which is in a foreign language unfamiliar to this Court;

7. that this cause of action has no contact with the Southern District of Florida and that the Public interest in providing a forum in Florida is out weighed by the costs of court congestion and jury duty;

8. that the judicial system of Costa Rica does provide a forum and a remedy for the Plaintiffs and both Defendants are subject to the jurisdiction of the Costa Rican judicial system or will submit to that jurisdiction;

9. and, that the application of the doctrine of forum non conveniens is within the sound discretion of the Court.

For support of their argument, the Defendants rely on *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), and *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

In their response to the motion to dismiss the Plaintiffs' argue that a major objective of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), was to avoid the unequal administration of the laws and the forum shopping that had previously been caused by the diversity jurisdiction of the Federal Courts. The Plaintiffs argue that to facilitate this objective the *Erie* Court attempted to minimize the variations between state and federal law as it would

be applied in diversity cases. The argument then asserts that under Florida law this action could not be dismissed on the ground of forum non-conveniens because the Defendants are residents of Florida.

Because the doctrine of forum non-conveniens would not be available in this case if it were in State Court the Plaintiffs' would have this Court distinguish this case from *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), relied on by the Defendants, and then apply the Florida Law of forum non-conveniens. The distinction that the Plaintiffs would have this Court make is that in *Piper* the state law of forum non conveniens was the same as the federal law of non conveniens while that is not the situation here.

The Court, having considered the arguments of the parties and being fully advised, finds that the law as stated in *Piper Aircraft*, 454 U.S. 235, and *Gilbert*, 330 U.S. 501, governs this case. The Court finds further that application of the factors listed in *Piper Aircraft* and *Gilbert* to the case at bar requires that the motions to dismiss be granted.

The doctrine of *forum non conveniens* is simply a tool that a court may use to resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of the law. General venue statutes are generally drawn to allow a plaintiff a choice of forums and Plaintiffs may be tempted to abuse their right to choose. *Gilbert*, 330 U.S. at 507. While the Plaintiffs choice of forums is usually assumed to be a convenient forum, that assumption is less reasonable and entitled to less weight when the Plaintiff is foreign. *Piper Aircraft*, 102 S. Ct. at 266. The determination of the *forum non conveniens* question is

within the sound discretion of the trial court and when it is based on a reasonable consideration of the *Gilbert* factors, it will not be disturbed. *Piper Aircraft*, 102 S. Ct. at 266.

The pertinent factors for consideration, as detailed in *Gilbert*, are:

1. the private interests of the litigants:

   a. the relative ease of access to sources of proof;

   b. availability of compulsory process for attendance of unwilling witnesses;

   c. the cost of obtaining the attendance of witnesses;

   d. the possibility of viewing the premises concerned;

   e. and, all other practical problems that make trial of a case easy, expeditious and inexpensive;

2. the public interest:

   a. congestion of the court docket;

   b. the burden of jury duty for a case that has little or no relation to the community;

   c. the application of the law by a forum that is familiar with the law which governs the case.

Gilbert, 330 U.S. at 508.

In addition, the Court in *Piper Aircraft* considered the availability of an alternative forum that could exercise jurisdiction and offer the Plaintiffs a remedy; the inability

to implead potential third party defendants in one jurisdiction; and, the added burden imposed on the Defendant as compared to the added convenience to be realized by the Plaintiffs. 102 S. Ct. 252.

Applying these considerations to the case at bar, the Court finds that the considerations overwhelming weigh in favor of dismissal. The private interests are hampered in that the alleged injuries occurred in Costa Rica. All the Plaintiffs are Costa Rican. Most of the evidence and witnesses are in Costa Rica and none are in Florida, and compulsory process would not be available to compel production of this evidence or the attendance of these witnesses. The cost of obtaining the evidence from Costa Rica would be substantial, if possible. The Defendants would not be able to implead potential third party defendants located in Costa Rica in this action in Florida. And, as was the case in *Piper Aircraft*, the Plaintiffs have not offered any specific reason showing the convenience of their choice.

As to the public interest factors, this case is essentially fifty eight different law suits with different elements of damages, negligence, contributory negligence etc. It could not help but congest this Court's docket more than it would that of a Court at the situs of the injury simply because of the logistics of dealing with fifty eight different Plaintiffs at this distance. It would force the Court to conduct a complex exercise in comparative law and consider a foreign law with which the Court is not familiar and which is in a foreign language. The avoidance of such comparisons is one of the objectives of the doctrine of *forum non conveniens*. *Piper Aircraft*, 102 S. Ct. at 263. It would require local jurors to hear and decide a

dispute that has no connection with this community. And, finally, the Defendants have asserted that Costa Rica offers the Plaintiffs an alternative forum with an adequate remedy, an assertion that has not been rebutted by the Plaintiffs.

The Plaintiffs contend that this Court must allow further discovery before it decides the issue of *forum non conveniens*. But the Court in *Piper Aircraft* found that a detailed inquiry into the facts was not necessary and, in fact would defeat the purpose of the doctrine. 102 S. Ct. at 7. As in *Piper Aircraft*, the Defendants here have moved for dismissal precisely because many crucial witnesses are located beyond the reach of the compulsory process of this Court and are thus difficult to identify or interview. The record contains the unrebutted allegations of the Defendants as to the difficulties caused by this choice of forum as well as affidavits substantiating such difficulties, this information is sufficient for the Court to adequately consider the *Gilbert* and *Piper Aircraft* factors.

As to the Plaintiffs' contention that state law should apply, the Court agrees with the statement of the United States District Court for the Southern District of Ohio in *in re Richardson-Merrell, Inc.*, 545 F.Supp. 1130 (S.D. Ohio 1982):

> [G]iven the discretionary nature of the *forum non conveniens* inquiry and the factors established by the Supreme Court to guide such a determination, it would appear anomalous for the Court to apply anything but federal principles.

545 F.Supp. at 1132.

And:

> Most of the 'public interest factors' affecting the convenience of the forum relate peculiarly to the *court* in which the case is pending, rather than to the state in which the federal court is located.

id. at n.3.

Accordingly, the Court does:

ORDER and ADJUDGE that the Defendants' Motions be, and they are, GRANTED. This cause is DISMISSED.

DONE and ORDERED in chambers at the United States Courthouse, Miami, Dade County, Florida this 25th day of August, 1983

JUDGE JAMES LAWRENCE KING
JAMES LAWRENCE KING
U.S. DISTRICT JUDGE

cc: all counsel

APPENDIX 16

Aguilar v. Dow Chemical Co., No. 86-4753 (C.D. Cal. Dec. 23, 1986)

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RODRIGO ESQUIVEL AGUILAR, et al., Plaintiffs, vs. DOW CHEMICAL COMPANY, et al., Defendants.	Case No. 86-4753 JGD (TX) ORDER VACATING ORDER TO SHOW CAUSE RE: REMAND; ORDER DISMISSING ACTION; ORDER REGARDING CONDITIONAL DISMISSAL (Filed Dec. 23, 1986)

On December 1, 1986, this Court found that it had diversity jurisdiction of this action and then granted the defendants' motion to dismiss this action on forum non conveniens grounds. Following the hearing, the parties submitted post-hearing briefs on the conditions of dismissal. Numerous issues and complicated facts have arisen during the brief time that this matter has been before this Court. By this Order, the Court now clarifies its reasoning in reaching the decisions of December 1, 1986 and also sets forth the conditions of dismissal.

I. UNDERLYING FACTS

On October 15, 1986, the plaintiffs, thirty-four citizens and residents of Costa Rica, filed a complaint in state court alleging causes of action for negligence, strict liability, and breach of the implied warranty of merchantability. The plaintiffs alleged that while working on a banana plantation in Costa Rica, they were exposed to a chemical, dibromochloropropane ("DBCP"), which had caused them to suffer personal injuries. Some of the plaintiffs' wives also brought claims for loss of consortium. The plaintiffs alleged that the defendants had manufactured, produced, sold, or had otherwise placed DBCP into the stream of commerce so that they were exposed to it.

Named as defendants were Dow Chemical Company ("Dow"), Shell Oil Company ("Shell"), and Amvac Chemical Corporation ("Amvac"). Neither Dow nor Shell are incorporated in California; neither has its principal place of business here. Amvac's principal place of business is in California, and it is incorporated in California. Although all of the defendants were of diverse citizenship from the foreign plaintiffs, the action could not be removed to federal court because of Amvac's presence. *See* 28 U.S.C. section 1441(b) (diversity action is removable "only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought").

On July 22, 1986, Dow filed a petition for removal; the other defendants joined in it. The reason alleged for removal was that testimony given at a deposition conducted on June 24, 1986 had disclosed that none of the

DBCP produced by Amvac had been used in the Costa Rican operations of the plaintiffs' employer. Dow therefore claimed that Amvac was merely a sham defendant and that the action was now removable to federal court.

On July 29, 1986, Dow filed a motion in this Court to the [sic] dismiss the action on forum non convenience grounds. Amvac filed a motion on the same ground on July 31, 1986. Shell joined in Dow's motion on August 4, 1986. Similar motions had been pending in state court at the time the action was removed.

Because of uncertainty about the status of Amvac as a defendant, on August 5, 1986, this Court served an order to show cause why the matter should not be remanded to state court. The order required that the defendants submit their papers by August 22, 1986 and that the plaintiffs file their response by August 29, 1986.

In accordance with the Court's order to show cause, the defendants submitted their memoranda of points and authorities on the remand issue by August 22, 1986, briefing in particular their contentions that Amvac was a "sham" defendant. On August 22, 1986, plaintiffs filed a motion to conduct further discovery on forum non conveniens. Their papers revealed for the first time that in fact the plaintiffs had filed an amended complaint in state court *one* day prior to Dow's filing of the petition for removal on July 22, 1986. As of August 22, 1986, none of the defendants had been served with the amended complaint, nor did any of them know of its existence. The amended complaint named as new defendants Dow Chemical International and Does 1 through 100.

Meanwhile, on September 10, 1986, this Court signed an order dismissing without prejudice Amvac from the action. The plaintiffs stated in their notice of dismissal that they had been unable to discover any evidence that the plaintiffs had been exposed to any DBCP-containing products manufactured or distributed by Amvac.

At a hearing conducted on September 15, 1986, this Court granted the plaintiffs' motion to conduct additional discovery with respect to the defendants' pending motions to dismiss on forum non conveniens. The Court allowed an additional month's discovery, noting that the plaintiffs had been on notice that this was an issue in the action and had presumably been conducting discovery on it since at least May 1986 when Dow filed a motion to dismiss on forum non conveniens grounds in state court.

Because the remand issue had never been resolved, that same date the Court served a minute order on all parties. In effect, the Court requested that the parties file supplemental briefs directed to the first amended complaint and the new issue of the Doe defendants. The Court suggested that the plaintiffs might use their additional discovery time to attempt to identify the Doe defendants. *See Bryant v. Ford Motor Co.*, 794 F.2d 450, 453 f.2d (9th Cir. 1986) (suggesting that the district court may wish to consider the state court plaintiff's response to a claim that Doe defendants are fictitious in determining whether remand is required).

On November 10, 1986, the Court continued resolution of the remand issue and the defendants' motion to dismiss on forum non conveniens until December 1, 1986. The Court expressed its concern that the petition for

removal did not strictly comply with the requirements of 28 U.S.C. section 1446(a) in that the petition had been based upon and had attached to it the original complaint filed in state court, rather than the amended complaint. Although all of the parties upon learning of its existence had treated the amended complaint as the operative pleading, the Court requested that the defendants file an amended petition for removal that would reflect the allegations of the amended complaint. *See London v. Standard Oil of California*, 417 F.2d 820, 822 (9th Cir. 1969) (allowing amendment of a removal petition to "cure any deficiency in establishing diversity jurisdiction").

On December 1, 1986, this Court, after first finding that it had jurisdiction over this matter, granted the defendants' motion to dismiss of forum non conveniens.

II. LEGAL ISSUES

A. Propriety of Removal

The plaintiffs in this action are all citizens of Costa Rico [sic]; the named corporate defendants are citizens of various states. Plaintiffs are claiming damages in excess of $10,000. District courts have original jurisdiction of matters where the sum in controversy exceeds $10,000 and the action is between "citizens of a State and citizens or subjects of a foreign state." 28 U.S.C. section 1332(a)(2).

At the time of removal, Amvac was still a defendant in this action, but the defendants had contended that recent deposition testimony revealed that Amvac was merely a "sham" defendant. Since Amvac was subsequently dismissed by the plaintiffs, the issues involving

Amvac are now moot. Dow Chemical International was named as a defendant in the amended complaint, although it was apparently never served. But since Dow Chemical International is incorporated in Delaware and has its principal place of business in Michigan, its presence would not have destroyed diversity.

Therefore, the primary issue before this Court was the effect of the Doe defendant allegations contained in the amended complaint. In *Sorosky v. Burroughs Corp.*, 798 F.2d 1274 (9th Cir. 1986), the Ninth Circuit stated that as a general rule the presence of Doe defendants defeats diversity since it prevents a court from affirmatively ascertaining that complete diversity exists. But the Ninth Circuit explained that an exception might apply " 'when the Does are wholly fictitious or when the charges against the Does are so general that no clue is given as to their identity or their relationship to the cause of action.' " *Id.* at 1276. In *Sorosky*, the court found that allegations that the Does were "agents and employees" of the defendant, "while lean," sufficed to give the defendants " 'some clue as to the possible identity' of the Doe defendants." *Id. See also Bryant v. Ford Motor Co.*, 794 F.2d 450, 451-53 (9th Cir. 1986) (purpose of allowing exception to rule was "the need to prohibit plaintiffs who initiate actions in state court from defeating removal jurisdiction by the use of pleading fictions").

At first glance, it appears that that [sic] the Doe allegations in the case at hand would fall within the parameters of the general rule set forth in *Sorosky, supra*, that the presence of Doe defendants ordinarily defeats diversity jurisdiction. The plaintiffs had alleged that each of the Doe defendants "was an agent, servant or

employee of the remaining Defendants" and that the Doe defendants were responsible for the "importation, operation, design, distribution, ownership, possession, supervision, servicing, maintenance, inspection, repair, control, entrustment, use, furnishing, manufacturing or sale of the premises which caused the injuries and damages herein alleged." Amended Complaint at ¶¶7, 8.

The complaint also alleged that the products in question were "manufactured, sold and distributed by Defendants Dow Chemical Company, Shell Oil Company, Amvac Chemical Corporation, Dow Chemical International, Inc. and DOES 1 through 100, inclusive, and each of them." *Id.* at ¶9.

However, given the peculiar circumstances of this action, the Court was convinced that the Doe defendants were "wholly fictitious." The Doe allegations were so broad that it was impossible to ascertain whether they did, in fact, provide the named defendants with a "clue" to the Doe defendants' identity. There also were no allegations in the amended complaint that even suggested that any of the employees or agents of the named defendants were foreign citizens. For in this particular situation, where all of the named plaintiffs were foreign citizens, only if the Doe defendants were foreign citizens would they defeat diversity.

In their supplemental brief on this issue, the plaintiffs did not claim or suggest that any of the Doe defendants were foreign residents. However, they identified Charles Hine Laboratories, Inc., a California corporation with its principal place of business in California, and Charles H. Hine, M.D., a California resident [the "Hine

entities"], as the Doe defendants. The plaintiffs alleged that they would move the Court to further amend their complaint in order to add the Hine entities as defendants.

The plaintiffs did not contend that the Hine entities were agents or employees of the named defendants, but they did claim that the Hine entities were "responsible for the testing" of DBCP-containing pesticides manufactured by Shell and that they had "participated in studies" with Dow researchers. The exhibits attached to the supplemental brief indicated that Charles H. Hine, M.D., while connected with the University of California, had conducted certain research related to DBCP during the 1950's and early 1960's.

The plaintiffs' "identification" of the Doe defendants posed some interesting questions. For one, the Hine entities do not appear to fall within the Doe allegations made in the amended complaint. The amended complaint stated that "each of the Defendants was an agent, servant or employee of the remaining Defendants." As noted above, the plaintiffs did not claim that the Hine entities were agents, servants, or employees of the named defendants, and the exhibits attached to their brief did not seem to indicate that this was the case. Furthermore, despite the extremely long and broad list of acts which the Doe defendants had allegedly performed, none of the Doe allegations related to the research and testing of the DBCP. There was also no suggestion that the Hine entities had "manufactured, sold and distributed" DBCP, although it had been alleged in the amended complaint that the Doe defendants, and "each of them," had done so. Thus, the Court concluded that the Hine entities were not identifiable by the Doe allegations.

Moreover, the presence of the Hine entities in the action would not destroy diversity since they were not foreign citizens. The plaintiffs argued, however, that the presence of Doe defendants that might be California residents dictated that the case be remanded to state court because an action cannot be removed initially when a defendant's citizenship is the same as the forum court.

28 U.S.C. section 1441(b) indicates that an action based upon diversity of citizenship "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." On its face, this section suggests that a defendant who is a citizen of the forum state – but who would not otherwise destroy diversity – must be *properly joined and served* in order to prevent removal.

In the case at hand, neither Charles E. Hine, M.D. nor Charles Hine Laboratories, Inc. had been joined or served at the time this action was removed to federal court. It thus appears that any later amendment adding them to the action on the basis of Doe defendant allegations or otherwise would not mandate remand to the state court. Their presence could not destroy diversity of citizenship, although it would have prevented removal initially had they been properly joined and served at that time.

The defendants drew this Court's attention to a possible contrary interpretation of section 1441(b) in *Pecherski v. General Motors Corp.*, 636 F.2d 1156 (8th Cir. 1981). This Court is not persuaded that *Pecherski* is convincing authority for the proposition that *once an action has been removed*, the federal court must remand it to state court if newly-named defendants or defendants substituted for

Doe defendants are citizens of the the [sic] forum state – even if their citizenship would not destroy diversity. The Court reaches this conclusion in part from the clear language of section 1441.

Moreover, *Percherski* differs factually from the case at hand. There the plaintiff was a citizen of the forum state. If the Doe defendant in question, "Jane Doe," were also a resident, the action could not have been removed because there would have been no diversity. Any argument that the action should not have been removed *solely* on the ground that she was a resident of the forum state was necessarily subsumed by the threshold question of diversity jurisdiction. But in the case now before the Court, the plaintiffs are not citizens of California. The presence of California defendants cannot destroy diversity. Therefore, the citizenship of the Hine entities would be significant only if they had been *joined and served* at the time the action was removed.

Both the Fifth and Tenth Circuits have held that once an action has been removed, a plaintiff may waive his right to object that some of the removing defendants were residents of the forum court. *McKay v. Boyd Construction Co.*, 769 F.2d 1084, 1086-87 (5th Cir. 1985); *American Oil Company v. McMullin*, 433 F.2d 1091 (10th Cir. 1970).

In *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 92 S. Ct. 1344, 31 L. Ed. 2d 612 (1972), the United States Supreme Court, in refusing to vacate a judgment on the ground that the district court had allegedly lacked jurisdiction, held that after an action had been tried on the merits "the issue in subsequent proceedings is not whether the case was properly removed, but whether the

federal district court would have had original jurisdiction of the case had it been filed in that court." *Id.* at 702-03.

In reaching this conclusion, the Court distinguished its decision from *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 71 S. Ct. 534, 95 L. Ed. 702 (1951). In *Finn*, the plaintiffs and one of the defendants had been citizens of the same state. Even though judgment had been rendered, the Court held that the action had been improperly removed, and it remanded the case to the district court with instructions to vacate the judgment. The distinguishing feature of *Finn* was that there was not complete diversity of citizenship. The district court did not have jurisdiction to try the case.

Waiver, of course, is not an issue in this case. But the authorities cited above suggest that removal procedures are not jurisdictional since they may be waived. There thus appears to be no reason why the "joined and served" language of section 1441 should not be strictly construed in those cases where diversity would not be destroyed. As noted previously, a district court has original jurisdiction of matters between "citizens of a State and citizens or Subjects of a foreign state." 28 U.S.C. section 1332 (a)(2). This Court has original jurisdiction over the parties. The presence of potential California defendants cannot destroy this jurisdiction; nor would their presence require remand since they were not joined and served when the action was removed.

B. Forum Non Conveniens

The Ninth Circuit has apparently not decided whether federal law or state law should be applied in

making a forum non conveniens determination. In *Miskow v. Boeing*, 664 F.2d 205 (9th Cir. 1981), the plaintiffs had filed an action in state court which the state court had dismissed for forum non conveniens. They then filed the same action in federal court, and the district court dismissed it for the same reason. On appeal, the Ninth Circuit declined to decide whether state law would govern forum non conveniens, but noted that if there was any doubt, the plaintiffs would have "a difficult burden to convince this court that it should not follow the state court's determination." *Id.* at 207 f.2.

Because of the facts in the case, the Ninth Circuit's conclusion seems ambiguous. But the Ninth Circuit clearly followed the standards enunciated by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947), in affirming dismissal of the action on forum non conveniens.

More recently, in *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir.), *cert. denied*, 106 S. Ct. 347 (1985), the Eleventh Circuit held that federal law, rather than state law, applied to a forum non conveniens determination. In that action, which was brought by co-workers of these plaintiffs, the Eleventh Circuit first discussed whether forum non conveniens is substantive or procedural. It then concluded that federal law should apply because a "trial court only reaches the state rule of decision, relating to the character and result of the litigation, once it has decided to try the case and determine whether the plaintiff has a valid claim for relief." *Id.* at 1219.

This Court finds the reasoning of *Sibaja* persuasive and therefore applies federal forum non conveniens

standards to this action. In *Piper Aircraft v. Reyno*, 454 U.S. 235, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981), the Supreme Court stated that under its earlier decisions the principal forum non conveniens inquiry is "convenience." *Id.* at 249. The Court further stated that "dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice." *Id.*

Traditionally the inquiry focuses upon the "private interest factors" affecting the litigants' convenience and the "public interest factors" affecting the forum's convenience. *Id.* at 258. Private interest factors include the ease of access to sources of proof; the availability of compulsary process for attendance of unwilling witnesses; the cost of obtaining willing witnesses; and the possibility of viewing the premises. Public factors include administrative difficulties, such as applying foreign law. *Id.* at f.6.

Applying these tests mandates dismissal of this action. All of the plaintiffs are citizens of Costa Rica and that is the situs of their alleged injuries. It is undisputed that much of the proof, including their medical records, is found in Costa Rica. Although plaintiffs have offered to bring certain witnesses to this forum at their expense, it is clear that this offer may only apply to "willing" witnesses – and many potential witnesses may not be willing or cooperative with the plaintiffs. It may thus be impossible for this Court to compel the attendance of vital witnesses or to compel the production of sources of proof. The convenience of the litigants could only be impaired by conducting the litigation in this forum.

Furthermore, the public factors bearing upon the administrative difficulties flowing from this action require dismissal. Neither the plaintiffs nor the defendants are citizens of this forum, and plaintiffs' alleged injuries did not occur in the State of California. Yet this Court would be required to conduct an action in which all of the thirty-four plaintiffs are Spanish-speaking, and many of their physicians (as evidenced by their affidavits) and other important witnesses may also be Spanish-speaking.

This Court would also be placed in the position of applying an unfamiliar law – that of Costa Rica. In *Hurtado v. Superior Court of California*, 11 Cal. 3d 574, 114 Cal. Rptr. 106 (1974), the California Supreme Court held that in determining the law to apply, it would analyze the respective interests of the states involved (governmental interest approach) . . . " *Id.* at 579. In *Hurtado* – where the defendants were California residents, the site of the accident was California, and the plaintiffs had chosen California as their forum – the court held that California law applied.

Under the *Hurtado* analysis, Costa Rica clearly has the more important governmental interest in providing a forum for residents allegedly injured in that country. But except for the most tenuous of claims, there is almost an absence of connections between the plaintiffs and the named defendants and this forum. The fact that in the past California courts may have litigated unrelated-DBCP cases is not sufficient to find that California would have a governmental interest in applying its law. If that were the benchmark for deciding whether a state's law would apply or whether it provided a convenient forum, the

doctrines of forum non conveniens and choice of law as we now know them would be eviscerated.

Finally, the plaintiffs contend that Costa Rica does not provide an adequate forum. While the documents submitted by the parties are somewhat contradictory, there does not appear to be any evidence that the plaintiffs could not obtain a fair trial in Costa Rica or that tort remedies are not available to them. While discovery may be conducted differently in a civil law country, that is not sufficient basis for requesting that an American court make a value judgment that these procedures are inadequate. Costa Rica provides an adequate forum. The named defendants have agreed to submit themselves to the jurisdiction of Costa Rican courts.

Even if the Court had determined that state law applied, it believes that its response to the forum non conveniens inquiry would have been the same. In *Holmes v. Syntex Laboratories*, 156 Cal. App. 3d 383, 202 Cal. Rptr. 386, an action in which British citizens were suing for injuries they allegedly sustained from drugs sold and ingested by them in England, a California appellate court appeared to restrict those situations in which California courts would dismiss for forum non conveniens.

But in determining that California provided a convenient forum, the court emphasized certain factors: 1) several of the defendants maintained their principal places of business in California; 2) the plaintiffs had alleged that the torts had been committed in California; and 3) the plaintiffs had presented facts demonstrating a connection between the defendants' conduct as it related to their

injuries and California. While this showing may be minimal, it is clearly much greater than that found in the case at hand.

III. CONDITIONS OF DISMISSAL

Having considered the post-hearing briefs submitted by the parties on the conditions of dismissal, the Court now makes the following order:

1. That the defendants submit to Costs Rican jurisdiction;

2. That the defendants agree to waive any statute of limitations defenses that have arisen during the pendency of this action, i.e., since its commencement in California Superior Court; and

3. That the defendants consent to satisfy any final judgment that may be rendered against them in Costa Rica.

DATED: December 23, 1986

/s/ John G. Davies
John G. Davies
United States District Court

Supreme Court, U.S.
FILED
DEC 10 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-388

In The

Supreme Court of the United States

October Term, 1990

DOW CHEMICAL COMPANY AND
SHELL OIL COMPANY,

Petitioners,

v.

DOMINGO CASTRO ALFARO, et al.,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of Texas

BRIEF IN OPPOSITION

BARON & BUDD, P.C.
8333 Douglas Avenue
Tenth Floor
Dallas, Texas 75225
(214) 369-3605

CHARLES S. SIEGEL
Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether defendants are denied due process by having to defend a suit brought by Costa Rican citizens in Texas, site of defendants' headquarters or major operations, when plaintiffs consent to come to Texas at their own expense for deposition, medical examination and trial, and when the claims arose out of defendants' actions in the United States.

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STATEMENT OF THE CASE

Respondents do not disagree with the Petitioners' recitation of the procedural history of this case, or with the irrelevant description of other cases. Petitioners have failed, however, to bring several important facts to the Court's attention.

At the time suit was filed, Petitioners were not subject to jurisdiction in Costa Rica. To this day, they are subject to Costa Rican jurisdiction only by virtue of their eager stipulation of consent to it. Tr. 815, 817.

Remarkably, the petition does not disclose that Petitioner Shell Oil Company's world headquarters are in Houston, Texas and that Petitioner Dow Chemical Company, headquartered in Michigan, has extensive operations and the country's largest chemical plant in and near Houston. See concurring opinion of Justice Doggett, App. 18.

The petition also does not state that plaintiffs have agreed to present themselves in Houston at their own expense for deposition, medical examination and trial, and that Shell stipulated that all of its documents relating to the pesticide that sterilized plaintiffs are located in Houston. Tr. 815; App. 18.

Respondents claim that exposure to pesticides manufactured and sold by Petitioners rendered Respondents irreversibly sterile. The pesticides, based on the chemical dibromochloropropane, were designed, tested, manufactured, labeled, and distributed by Petitioners in the United States. The Respondents' employer is headquartered in Florida. App. 17. Petitioners continued to sell the

pesticide for use abroad, and Respondents continued to be exposed, after DBCP was banned in this county. App. 17.

REASON FOR DENYING THE WRIT

This case is entirely unworthy of review by this Court. First, the case should be disposed of without review for failure to raise the due process claim timely below. Second, there simply is no need for the Court to address, let alone any possibility of upholding, the claim that it is a denial of due process for a defendant to have to litigate in its own backyard.

I. THE DUE PROCESS CLAIM WAS NOT RAISED TIMELY BELOW AND THEREFORE CANNOT BE CONSIDERED HERE.

Petitioners acknowledge at p. 6 of the petition that the constitutional argument it now presses was not raised until their petition for rehearing in the intermediate Texas Court of Appeals. This failure is fatal to review, for it is essential that a constitutional argument be raised in a timely manner in lower state proceedings. *Stembridge v. Georgia*, 343 U.S. 541, 72 S.Ct. 834, 96 L.Ed. 1130 (1952) (constitutional claim raised in petition for rehearing to intermediate state court would not be reviewed); *Beck v. Washington*, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed. 98 (1962). The reasons for this longstanding rule are reiterated in

Cardinale v. Louisiana, 394 U.S. 437, 439, 89 S.Ct. 1162, 1164, 22 L.Ed.2d 398, 400 (1969).

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality.

Accordingly, a constitutional claim must be raised at the time prescribed by state practice. *Ferguson v. Georgia*, 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961). Here, the facts are plain. Both Petitioners answered Respondents' original petition, without raising any jurisdictional objections. The answer was a general appearance and thus a consent to jurisdiction. Tex. R. Civ. Proc. 121; *Trails East v. Mustafa*, 713 S.W.2d 422 (Tex.App. 1986, no writ).

Defendants also filed forum non conveniens motions, but perhaps because of the strangeness of such a claim, it did not even occur to them to claim that they would be *denied due process* by having to litigate in Texas.

Petitioners' general appearance waived any objection whatsoever to jurisdiction. it is therefore unnecessary to examine Texas procedure any further; it suffices to say that Texas follows the general rule that issues, including constitutional ones, raised for the first time on appeal are waived. *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 856 (Tex.App. 1987, writ ref'd n.r.e.); *United States Reading*

Lab, Inc. v. Brockett, 551 S.W.2d 531 (Tex. Civ. App. 1977, no writ).[1]

Petitioners not only fail the threshold test of timely raising the due process claim, however; they also must acknowledge that the majority of the Texas Supreme Court was silent on the question. It must be assumed that the silence is due to the deficiency in timeliness. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3, 103 S.Ct. 2296, 2301 n.3, 76 L.Ed.2d 497 (1983); *Bailey v. Anderson*, 326 U.S. 203, 206-07, 66 S.Ct. 66, 68, 90 L.Ed. 3 (1945).

In these circumstances, where the due process claim was not raised until far too late, and where the majority below quite properly declined to consider it, there is no occasion for certiorari review here.

II. THE RULING BELOW IS ENTIRELY CONSISTENT WITH PRECEDENT AND DOES NOT REMOTELY IMPLICATE CONCERNS WORTHY OF REVIEW.

Seeking to elevate forum non conveniens to a new constitutional status, Petitioners must contend that they are entitled to it because otherwise they would be denied

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[1] The generalized due process claim made by Petitioners is properly viewed as a challenge to jurisdiction, in that Petitioners claim that having to defend in Texas would not comport with the second prong of the due process analysis and therefore the test for jurisdiction is not met. See petition at 11 n.9. Elsewhere, however, Petitioners seem to admit the existence of personal jurisdiction yet claim a sort of constitutional entitlement to forum non conveniens. Under either formulation, the constitutional argument came too late.

due process by having to litigate in Texas. It would be wholly unprecedented, however, to hold that a corporation is denied due process by litigating at home. Even if it is accepted that forum non conveniens is necessary to provide a "safety valve" for cases that otherwise meet "fair play" jurisdictional prerequisites – a dubious proposition with which Respondents strongly disagree – the facts of this case make it completely unsuitable as a means of deciding the issue.

A. No Precedent Even Hints at Petitioners' Position.

The failure of petitioners to cite one case from this Court – or any other court – even suggesting a denial of due process on similar facts underscores the lack of need for review here. The ruling below is squarely consonant with due process analysis.

Petitioners quote, selectively, only from two cases. The most recent is *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), in which the Court evaluated jurisdiction of a California court in an indemnity claim by a Taiwanese corporation against a Japanese corporation. The primary plaintiff had sued the Taiwanese defendant but settled, leaving only the indemnity claim against Asahi, the Japanese third-party defendant. Asahi moved to dismiss for lack of personal jurisdiction. This Court held, inter alia, that the "fair play and substantial justice" element of due process had not been met.

The present case would stand *Asahi* on its head. The first, and most important, "fair play" factor there was the burden on Asahi:

> Certainly the burden on the defendant in this case is severe. Asahi has been commanded by the Supreme Court of California not only to traverse the distance between Asahi's headquarters in Japan and the Superior Court of California in and for the County of Solano, but also to submit its dispute with Cheng Shin to a foreign nation's judicial system. The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.

Id., 480 U.S. at 114.

Here, by contrast, defendants are seeking the very burdens *Asahi* condemns. Having been sued at home, Petitioners stipulated to the jurisdiction of a foreign country where it could not have been sued, and sought to move the litigation far from the site of their own witnesses and evidence. This Court also noted that "[w]hen minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant." Petitioners here are residents who *want* the burdens of *Asahi*; indeed they ask this Court to hold that they are constitutionally entitled to undertake what *Asahi* constitutionally forbids. As this case could not possibly coexist with *Ashai*, were Petitioners' position upheld, it should be left alone.

The other case quoted by Petitioners is *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). *Burger King upheld* jurisdiction over a Michigan resident by a Florida court; the defendant never visited Florida, sold products there, or employed anyone

or maintained a place of business there. Again, it is impossible for Petitioners' position to be reconciled with this case: the contacts here are simply qualitatively and quantitatively different.

Petitioners seize, however, on dictum by Justice Brennan in the opinion to the effect that in cases of substantial inconvenience to the defendant, but where "fair play" notions are satisfied, means short of denying jurisdiction can usually alleviate difficulties. See 471 U.S. at 477. It is this dictum that is the sole support for the proposed constitutional enshrinement of forum non conveniens.

Most recent commentators believe that forum non conveniens is an outdated, amorphous doctrine which serves only as to obscure jurisdictional decisionmaking. See, e.g., Robertson, *Forum Non Conveniens in England and America: a Rather Fantastic Fiction*, 103 Law Q. Rev. 97 (1988); Stewart, *Forum Non Conveniens: a Doctrine in Search of a Role*, 74 Cal. L. Rev. 1259 (1986). Even if the Court wishes to join the debate, however, or even to constitutionalize another layer of court-access doctrine, this is not the case in which to do it. As detailed immediately below, the assertions by Petitioners of difficulties in litigating are simply false, and there is no need for any "safety valve" doctrine.

B. The Difficulties Claimed by Petitioners Do Not Exist.

The assertions at pp. 14-15 of the difficulties faced by Petitioners, copied almost verbatim from the briefs to the Texas Supreme Court, Pet. App. 133, 147-48, are untrue, and tellingly are accompanied by no record citations. This

Court should forego review based on unsupported claims of hardship.

At the outset, it must be remembered that Petitioners did not even think to claim a due process violation until after appellate review; they litigated this case for over three years in the trial court, propounding discovery on substantive issues including limitations and product exposure. App. 21. As Justice Doggett noted in his concurring opinion, "[m]any of the so-called 'convenience' problems had already been resolved in this litigation prior to the dismissal under forum non conveniens." Pet. App. 21 n.4. How this Court should find a denial of due process where Petitioners did not even claim it in three years of litigation is not explained in the petition.

Pressing here the violation not even noticed below, Petitioners first state that "Plaintiffs' counsel has admitted that not all of the plaintiffs' treating doctors will be available for examination by Dow and Shell." Petition at 14. No record citation is given, and there is none. Plaintiffs did produce affidavits from most of their treating physicians that they *would* appear willingly in Houston, Pet. App. 18; in any event, there is no showing that any other physicians will not testify pursuant to a subpoena served under Tex. R. Civ. Proc. 188 or 200, or that other physicians are somehow more available to plaintiffs than to Petitioners.

Next, Petitioners state that "there is no assurance that all of plaintiffs' medical records will be produced, or that all pertinent records from the plaintiffs' Costa Rican employer will be produced." Pet. App. 14. There is never "assurance" in any injury case that all medical records

will be produced, and as plaintiffs bear the burden of proof, any difficulty in obtaining medical records will work against them. In any event Petitioners are entitled to an independent medical exam by the Texas Rules of Civil Procedure which will enable them to provide a complete medical defense. The court should note that Respondents have already agreed to appear for an independent medical exam in Houston, Texas, the expenses of travel to be borne by Respondents.

Petitioners apparently are attempting to deliberately mislead the Court when they state that plaintiffs' employer is Costa Rican; the employer is Standard Fruit Company, headquartered in Boca Raton, Florida. Pet. App. 17, 19. Standard Fruit is a subsidiary of Dole Fresh Fruit Company, which markets the bananas grown by plaintiffs under the Dole trademark. *Id.*

It is simply false, therefore, that Petitioners cannot compel testimony from the employer, since the employer is subject to a Texas subpoena. Furthermore, the claim that the employer will be uncooperative, or that "there is no assurance that Dow and Shell and their representatives would be granted access by the plaintiffs' employer to the site of the alleged exposure," Pet. App. at 15, is disingenuous. Standard Fruit agreed to indemnify Dow for claims resulting out of continued use of DBCP after the chemical was banned in the United States. See Letter Agreement between Dow and Standard Fruit, attached to Respondents' supplement brief in the Texas Supreme Court and included here in Respondents' Appendix at 11-15. It is highly likely, therefore, that the employer will make every effort to assist in the defense of this case.

Petitioners next state that they will be unable to join third-parties who are not subject to the jurisdiction of the Texas trial court. In the almost seven years that this case has been pending, Petitioners have never even identified, let alone sought to implead, any third-party defendants. Petitioners can no more involve imaginary third-party defendants than Respondents can invent primary defendants located in Texas. The obvious third-party defendant, if there is one, is the employer, an American entity.

The difficulties posed by Petitioners are illusory. As the issue here is whether this Court should review the due process claim, Respondents will omit discussion of the enormous, plainly preclusive difficulties they would face if trial were in Costa Rica. See generally Pet. App. at 23-24 n.6. Plaintiffs' interests are part of any "fair play" analysis. But the due process denial said to warrant review here is so far-fetched that inquiry need go no further.

Finally, it is worth noting that although all four dissenters in the Texas Supreme Court wrote separate opinions, none expressed the opinion that this was clearly a case that should be dismissed on forum non conveniens grounds or that created a due process problem. All four dissenting justices would have remanded to the trial court for further development. See Pet. App. at 41, 57, 68, 71 and 87. Indeed, Justice Cook, the only dissenter to discuss at any length the belated due process claim, wrote: "I do not lightly suggest that the due process clause is, or should be, implicated in the case before this court". Pet. App. at 68.

If the doctrine of forum non conveniens is suddenly to be given constitutional dignity, Respondents submit that the investiture should come in an appropriate case. This case is not one. Where no dissenter below felt strongly about the issue, where the difficulties said to create a due process denial simply do not exist, and especially where years of litigation and an appeal passed before Petitioners even thought to make the claim, there is no occasion for review. Inquiry into any constitutional necessity for forum non conveniens should await an appropriate case.

CONCLUSION

Respondents respectfully maintain that the due process claim was waived below, was accordingly not considered by the Texas Supreme Court, and so cannot be heard here. In any event, it is baseless; any constitutional treatment of forum non conveniens should await a case where the due process need is at least colorably presented.

Because the ruling below is incapable and unworthy of review, Respondents request that the petition for writ of certiorari to the Supreme Court of Texas be denied.

Respectfully submitted,

CHARLES S. SIEGEL
BARON & BUDD, P.C.
8333 Douglas Avenue
Tenth Floor
Dallas, Texas 75225
(214) 369-3605

APPENDIX

No. C-7743

IN THE
SUPREME COURT OF TEXAS

DOW CHEMICAL COMPANY AND
SHELL OIL COMPANY,
Petitioners,

v.

DOMINGO CASTRO ALFARO, ET AL.,
Respondents.

ON WRIT OF ERROR

SUPPLEMENTAL BRIEF IN RESPONSE TO NEW AMICI CURIAE'S AND OTHER POST-ARGUMENT BRIEFS

BARON & BUDD, P.C.
8333 Douglas Avenue
10th Floor
Dallas, Texas 75225
(214) 369-3605

CHARLES S. SIEGEL
For The Firm
March 1, 1989

SUPPLEMENTAL BRIEF IN RESPONSE TO NEW AMICI CURIAE'S AND OTHER POST-ARGUMENT BRIEFS

Recently an amicus curiae brief was filed by the Products Liability Council and the Motor Vehicle Manufacturers Association urging a new manner of construing the Tex.Civ.Prac. & Rem. Code §71.031. This brief responds to the arguments in that amicus brief and also

to assertions made by Petitioners in their post-submission briefs.

1. To whom is the statute directed?

The new amici argue that it is unclear whether §71.031(a) is directed to courts or to plaintiffs. The section provides that "an action" which meets the enumerated requirements "may be enforced in the courts of this state." If the section is directed to plaintiffs, amici contend, then clearly plaintiffs have the discretionary right to enforce their actions here; if, however, the section is directed to court, then courts "may" or may not enforce actions as they please.

Amici assert that it is impossible to discern to whom the statute is directed, apparently in the belief that such an ambiguity will free this Court from its obligation to follow a patently clear law. There is, however, no such ambiguity involved: the statute is, and can only be, directed to plaintiffs.

First, plaintiff possess action; courts do not. As a matter of common sense, a statute concerning actions is necessarily directed to those who possess actions. The Legislature logically directed provisions affecting rights of enforcement of actions to those whose rights were being affected.

Second, it is easy to discern whether the section is directed to courts or to plaintiffs by insertion of the alternative clarifying subject phrases "by courts" or "by plaintiffs." Under amici's suggested interpretation, the statute would provide that "an action . . . may be

enforced by courts in the courts of this state . . . " Clearly this construction requires a redundant and nonsensical reading of the actual language.

Conversely, if we insert a phrase directing the section to plaintiffs, the statute still read sensibly: "an action . . . may be enforced by plaintiffs in the courts of this state . . . "

In short, there can be no uncertainty about the recipient of the statutory right of enforcement. If clarifying language is inserted, the section can be read sensibly only when directed to plaintiffs.

Finally, it is plain that when the Legislature wished to speak to court, it knew how to do so. Section 71.031(c) provides that "[t]he court shall apply the rules of substantive law that are appropriate under the facts of the case." Had it intended §71.031(a) to apply to courts and not to plaintiffs, the Legislature would have used similar language.

2. Public Policy

Petitioners have argued that it is not appropriate for an American court to decide this case. In its post-submission brief, Dow cites *Harrison v. Wyeth Labortories*, 510 F.Supp. 1 (E.D.Pa. 1980). The crucial distinction between *Harrison* and this case is that in *Harrison* the product in question was manufacturer in the foreign forum where plaintiffs resided. This difference was noted in a subsequent opinion denying forum non conveniens dismissal of suits brought by foreign Dalkon Shield claimants. *Hodson v. A. H. Robins Co.*, 529 F.Supp. 809, 821 (E.D.Va. 1981).

The Fourth Circuit affirmed this ruling after *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), was decided. *Hodson v. A. H. Robins Co.*, 715 F.2d 142 (4th Cir. 1983). See also *Kontoulas v. A. H. Robins Co.*, 745 F.2d 312 (4th Cir. 1984).

In regard generally to the issue of whether American courts should decide controversies involving foreign plaintiffs and wrongdoing by American defendants, Respondents refer the Court to an opinion by Judge Bork, *Friends for all Children, Inc. v. Lockhead Aircraft Corp.*, 7171 F.2d 602 (D.C. Cir. 1983), also decided after *Piper Aircraft*. In this case, Vietnamese orphans were injured in the crash of a jet during an airlift evacuation program. They had been on their way to meet new adopting parents in several foreign countries. The decision to undertake the airlift program was made in Washington, D.C. The plan was manufactured in the United States, but not in Washington, and Lockheed was not headquartered in Washington. The United States joined Lockheed in urging forum non conveniens dismissal.

Nevertheless, Judge Bork, joined by then-Judge Scalia and Senior Judge Bazelon, held that even though alternative adequate forums existed, it was appropriate for an American court to pass on the liability of Lockheed. See 717 F.2d at 609-10.

Respondents submit that when compared to the *Lockheed* case, the present action merits American judicial involvement even more strongly. The pesticides were researched, designed, formulated, manufactured, labeled, distributed and shipped in the United States by American companies. They were sold to an American company for use on American-owned land by workers employed by

the American company. They were applied to Dole bananas grown entirely for American consumption. The bananas were shipped back to America and sold entirely in American stores. Petitioners would have everything in the equation be American but the consequences.

3. Witnesses and Records

Shell has stipulated it will produce witnesses in this country, see Shell's post-submission brief at 2, and Respondents did not assert otherwise. What Respondents pointed out, and again call to the Court's attention, is that *both Shell and Dow refuse to make their witnesses or documents available in Costa Rica* – despite Respondents' stipulation to appear in Texas for deposition and medical examination.

28 U.S.C. §1782 adds nothing to Petitioners' position. That statute merely allows[1] a U.S. district court to make Petitioners produce witnesses in this country – something they would be required to do in any event. If the case is tried here, Petitioners would of course have to produce witnesses in this country; convenience of litigation is not furthered by an offer to produce witnesses in this country for litigation in Costa Rica.

To repeat: if the case stays here, Petitioners naturally must produce witnesses in this country. The magnanimous offer to produce witnesses *in the United States* if the case is tried in *Costa Rica* is meaningless.

---

[1] The provision is discretionary. *In re Letters Rogatory from the Tokyo District Court*, 539 F.2d 1216 (9th Cir. 1976).

Respondents are unable to account for the apparent assertion by Shell, post-submission brief at 3, that officials of Respondents' employer have not testified in this action. Again, Standard Fruit Company and Dole Fresh Fruit Company are headquartered in Boca Raton; officials of these companies have testified; and Respondents will provide the Court with copies of their deposition transcripts if desired.

Shell continues to state that some medical records have not been produced, and complains that one treating physician who has stated he will testify in Houston "refused to provide an affidavit for Shell for use in this litigation." Shell has never supported its claim that more medical records exist. To Respondents' knowledge they do not exist, and Shell's continued insistence on this point cannot create them. As for the doctor, one can only assume that he could not swear to whatever it is Shell asked him to swear to.

Finally, Shell still insists that the several years of litigation in this case have been limited to forum non conveniens issues. The transcript, however, reflects the long and exhaustive activity in this case on product identification, medical and limitations issues. As noted in oral argument, Shell and Dow could have stood on their forum non conveniens plea five years ago; instead, they propounded and conducted extensive discovery.

4. Sales of DCBP for use in Costa Rica After American Regulatory Action.

On April 15, 1976, the Environmental Protection Agency listed DBCP as a candidate for "Rebuttable

Resumption Against Registration" status "based on potential for carcinogenic effects." On August 11, 1987, Dow halted all production and *American* sales of DBCP. On August 25, 1977, Dow announced the recall of all DBCP from users and distributors; Shell took the same action the next day.

On Sept. 5, 1977, EPA issued its notice to suspend DBCP use because "not only is DBCP a powerful carcinogen in animals which provides strong evidence that it is a human carcinogen, but that it may also damage human reproductive functions and may cause sterility in males." See EPA suspension notice at 6; see generally 43 Fed. Reg. 40911 (Sept. 13, 1978).

The suspension notices, the halt in production, and recall from American users all took place well before February 23, 1978 when Dow sent a signed letter agreement to Standard Fruit, acknowledging the toxic effect of its pesticide and requiring Standard Fruit to hold Dow harmless for injuries resulting from continued use of Dow products. See Exhibit "A". Dow sales to Standard Fruit in Costa Rica continued until as least November, 1978, *over a year after Dow recalled all DBCP from American users.*

The letter attached as Exhibit "A" also stated that construction of the indemnity agreement is to be governed by Michigan law. Dow and Shell have long invoked imaginary third-party defendants, arguing that such defendants may not be able to be joined in Texas, but have never identified any such defendants. The obvious third-party defendant, of course, is Standard Fruit, and

Standard Fruit and Dow have already agreed that their dispute will be governed by American law.

5. Bhopal case

Petitioners have cited the Bhopal actions filed in Jefferson County as proof that the state is flooded by foreign actions. The distinction between those cases and the present case, however, demonstrates that actually very few foreign cases are even governed by §71.031.

India does not have equal treaty rights with the United States. Therefore, the right to enforce an action is not granted by §71.031(a), because subsection (3) requires that "in the case of a citizen of a foreign country, the country has equal treaty rights with the United States." This was the first ground of dismissal urged by Union Carbide in its motion to dismiss. See attachment to Dow's post-submission brief.

A publication of the U. S. State Department lists 43 countries with "Fellowship, Commerce and Navigation" treaties in force with the United States similar to that between the United States and Costa Rica. Thirty-three of these countries have treaties with the United States containing provisions concerning equal rights of court access. The State Department lists are attached as Exhibit "B".

Since there are over 170 countries in the world, the vast majority of all foreign plaintiffs cannot even invoke §71.031. As discussed previously, those suits which do come under the statute will, in practice, be limited by

admiralty law and removal rules to nonmaritime cases with bona fide Texas defendants.

In short, Texas simply will not be flooded by foreign causes of action. Section 71.031 and its predecessors have existed for 76 years, a holding affirming its mandatory nature has existed for 57 years, and we have not been flooded. Treaties and jurisdictional rules will take care of the vast majority of foreign claims today.

Respectfully submitted,

BARON & BUDD, P.C.
8333 Douglas Avenue
10th Floor
Dallas, Texas, 75225
(214) 369-3605

BY: /s/ CHARLES S. SIEGEL
CHARLES S. SIEGEL

EXHIBIT "A"

(SEAL) DOW CHEMICAL INTERNATIONAL INC.

SAN FRANCISCO SALES OFFICE
DRAWER M
WALNUT CREEK, CALIFORNIA 94456
PHONE 415 994-2345
CABLE OCCIDENTAL

February 23, 1978

Mr. Paul Sink
Castle & Cooke, Inc.
50 California Street
San Francisco, Calif. 94111

Dear Paul:

I am enclosing the following documents:

1. Letter Agreement with Standard Fruit signed by Standard Fruit and Dow.

2. Addendum to the Sales Contract with Castle & Cooke spelling out the volumes, formulations, packages and unit price for each. Please sign a copy and return to me.

3. A draft of the P.R. release we would plan to make in case of adverse press reactions. We suggest that Castle & Cooke/Standard Fruit read this and comment on it to us if you so desire. We do not plan to release this unless absolutely necessary. Castle & Cooke/Standard Fruit may want to draw up a similar release, but we strongly recommend you follow the same guidelines as to wording and release. We would appreciate receiving a copy of your proposed draft release for our review and comments.

4. Fumazone* formulation suggestions for Castle & Cooke – Philippines.

---

*Trademark of The Dow Chemical Company

5. Secrecy agreement on the Fumazone formulations to be signed and returned to me.

6. The new Fumazone label will be given to you shortly as well as the inventory and pricing on the needed stabilizers that we have in stock and will offer to you.

Please note – the sale of this Dibromochloropropane product includes the right in the Philippines to formulate and use the quantity shipped as a nematicide under our Philippine patent.

We hope you find everything in order and I wish to express our appreciation for your cooperation and assistance.

Best regards.

Very truly yours,

/s/ B.V. Daley
B.V. Daley
Manager

EVD/mlm

enc.

(SEAL) THE DOW CHEMICAL COMPANY

BENNETT BUILDING
2639 DOW CENTER
MIDLAND, MICHIGAN 48640

Standard Fruit Company
50 California Street
San Francisco, CA. 94111

This Letter Agreement will serve to confirm the Agreement reached amongst The Dow Chemical Company (DOW), Dow Chemical International Inc. of Delaware (DOWINTAL) and Standard Fruit Company (STANDARD FRUIT COMPANY), in respect of the purchase of "Fumazone" Brand Dibromochloropropane ("Fumazone") from DOWINTAL.

In connection with the purchase of "Fumazone" from DOWINTAL, STANDARD FRUIT COMPANY hereby acknowledges receipt from DOW of certain information pertaining to the toxicity and use of "Fumazone", a description or copy of all such material which has been attached hereto.

STANDARD FRUIT COMPANY hereby confirms to DOW and DOWINTAL that it has read and understands such information. In addition, STANDARD FRUIT COMPANY herein agrees that: a) it has maintained policies and practices relating to the handling, storage and use of "Fumazone" which takes into consideration the toxic nature of the material, as the same have been disclosed by DOW and DOWINTAL; b) it is familiar with temporary OSHA standards and has implements or will implement applicable work standards in respect of protective clothing training, etc. referred to therein; and c) it will

assume the entire responsibility, liability, and risk arising out of or in connection with its use of "Fumazone" purchased from DOWINTAL and will indemnify and hold harmless DOW, DOWINTAL, any other corporation controlled by or controlling DOW or DOWINTAL, or their agents, servants, and employees, from and against any and all losses, expenses, demands, and claims made against any of them by any employee, officer, or director of Castle & Cooke, Inc. or STANDARD FRUIT COMPANY or any subcontractor or applicator of Castle & Cooke, Inc. or STANDARD FRUIT COMPANY or their agents, servants, or employees, or by any third party whatsoever because of any injury or alleged injury to person or persons (including death) or damage or alleged damages to property, arising out of or in connection with the use and application of said "Fumazone" purchased from DOWINTAL, and further agrees to take over and pay the cost of DC defense in any such action, provided, however, that STANDARD FRUIT COMPANY shall have no obligation hereunder to indemnify, hold harmless, and defend DOW and DOWINTAL as herein provided in situations where any such injury or damage arises out of DOW's primary negligence in respect of the manufacture of such "Fumazone" which fails to meet the specifications therefor. DOW or DOWINTAL shall have the option to assume its own defense, in which case STANDARD FRUIT COMPANY shall reimburse DOW or DOWINTAL for the reasonable cost of such defense, provided that all the conditions of this Latter Agreement set forth above shall have been met:

Said "Fumazone" is being supplied by DOW or DOWINTAL without warranty of any kind, except that, said

material at time of delivery to STANDARD FRUIT COMPANY shall conform to the specifications thereof, DOWINTAL is conveying good title thereto, and such material shall be delivered free from any lawful security, lien, or encumbrance. *Neither DOW nor DOWINTAL make any warranty of merchantability or fitness for a particular purpose, nor is there any other express or implied warranty, except as provided herein.* DOW or DOWINTAL's liability for failure of this material to conform to the above-described warranties shall be limited to returning to STANDARD FRUIT COMPANY the amount of the purchase price of goods previously received by DOWINTAL. In no event shall DOW or DOWINTAL be liable for any incidental or consequential damages arising out of or in any way connected with DOWINTAL's sale to STANDARD FRUIT COMPANY of this material.

STANDARD FRUIT COMPANY hereby agrees that it is purchasing Fumazone for its or the use of its subsidiaries or affiliates outside the U.S.A. It will not this material to any persons or companies other than any subsidiaries or all outside the U.S.A. of STANDARD FRUIT COMPANY or Castle & Cooke, Inc., without obtaining DOW's and DOWINTAL's Written Consent.

STANDARD FRUIT COMPANY hereby agrees that in the event DOW or DOWINTAL should elect for any reason to withhold delivery on all or any portion of "Fumazone" referred to herein. DOW or DOWINTAL shall have no liability whatsoever in respect thereof except to return to STANDARD FRUIT COMPANY that portion of the purchase price previously received for such material that is not shipped.

STANDARD FRUIT COMPANY hereby agrees that this Letter Agreement shall be governed by the laws of the State of Michigan.

STANDARD FRUIT COMPANY hereby acknowledges and agrees that any technical or other advice or support relating to the handling, storage or use of "Fumazone" furnished by DOW, DOWINTAL or any company controlled by or controlling either of them shall be furnished in good faith only, that neither DOW, DOWINTAL, or such other company makes any warranties whatsoever with respect thereto, and that STANDARD FRUIT COMPANY shall have sole responsibility for determining the suitability of such advice.

If this Letter Agreement is in accordance with your understanding of the agreement amongst DOW, DOWINTAL and STANDARD FRUIT COMPANY, please have an authorized officer of your company sign and date both of the duplicate originals of this Latter Agreement in the place indicated below and return one original thereof to the undersigned for our files.

Very truly yours,

THE DOW CHEMICAL COMPANY

By E. B. Barnes
E. B. Barnes
Title Executive Vice President
Date February 6, 1978

DOW CHEMICAL INTERNATIONAL INC. OF DELAWARE

By R. W. Lundeen
R. W. Lundeen
Title Vice President
Date January 30, 1978

AGREED TO AND ACCEPTED:

STANDARD FRUIT COMPANY

By Illegible
Title Assistant Secretary
Date January 19, 1978

Enclosure

Supreme Court, U.S.
FILED
DEC 21
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-388

In The

Supreme Court of the United States

October Term, 1990

DOW CHEMICAL COMPANY AND
SHELL OIL COMPANY,

Petitioners,

v.

DOMINGO CASTRO ALFARO, ET AL.,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of Texas

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

F. WALTER CONRAD
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1234

Counsel for Petitioner
Dow Chemical Company

BURT BALLANFANT
SHELL OIL COMPANY
4794 One Shell Plaza
P. O. Box 2463
Houston, Texas 77252
(713) 241-7023

Counsel for Petitioner
Shell Oil Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

I. LIST OF ALL PARTIES

Petitioners, defendants below, are Dow Chemical Company ("Dow") and Shell Oil Company ("Shell"). Pursuant to Supreme Court Rule 28.1, a list of all of Dow's parents, subsidiaries, and affiliates was attached to the Petition for Writ of Certiorari as Appendix 10, at App. 108-13. A list of Shell's parents, subsidiaries, and affiliates was attached to the Petition for Writ of Certiorari as Appendix 11, at App. 114-20. Respondents, plaintiffs below, are thirty-five Costa Rican nationals. A list of all respondents was attached to the Petition for Writ of Certiorari as Appendix 9, at App. 121.

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IV. REPLY ARGUMENT

1. PETITIONERS TIMELY RAISED THEIR FEDERAL DUE PROCESS CLAIM IN THE TEXAS COURTS.

Respondents' assertions that the federal due process question was not timely raised below are contradicted by the undisputed procedural history of this case. In fact, the federal due process argument that petitioners ask this Court to review was raised before *before the Texas trial court*, the Texas Court of Appeals, and the Supreme Court of Texas. Indeed, this claim was raised before *every* Texas court petitioners appeared before. Even under respondent's authorities, no more is required.

In addition to being timely raised below, petitioners' federal due process argument was expressly considered by one Justice of the Texas Court of Appeals and two Justices of the Texas Supreme Court. Under well-established precedent of this Court, this is plainly sufficient to preserve this claim for review in this Court.

The due process argument that petitioners ask this Court to review was presented to the 61st Judicial District Court of Harris County, Texas on March 3, 1987, in petitioner Shell Oil Company's Renewed Motion for Dismissal Without Prejudice on Grounds of Forum Non Conveniens. Relevant portions of this motion are reproduced as Supplemental Appendix 1, at S. App. 1-3 (Tr. 197-207). This motion expressly presented the following argument to the Texas trial court:

> The Due Process Clause of the Fifth Amendment is "essentially a recognition of the principals of justice and fundamental fairness in a given set of circumstances." It would be fundamentally unfair to allow this matter to proceed any further in Texas.

S. App. at 1 (Tr. 206) (citation omitted). This motion went on to expressly present the arguments made to this Court that the unequal ability of the petitioners to obtain crucial evidence from Costa Rica, while respondents would have all of the advantages of civil discovery Texas, would operate to deprive petitioners of due process of law. *See* S. App. at 1-3 (Tr. 206-07). The Texas trial court, however, dismissed this action on the grounds of forum non conveniens, and did not need to reach petitioners' federal due process arguments. The unpublished order of the 61st Judicial District Court of Harris County, Texas, dated June 22, 1987, dismissing this action on the basis of forum non conveniens was reproduced as Appendix 3, at App. 99-101.

After the trial court granted petitioners' motion to dismiss on the ground of forum non conveniens, respondents appealed the order of dismissal to the Court of Appeals for the First Supreme Judicial District of Texas at Houston, the intermediate state appellate court. Since the trial court's order of dismissal was based on the doctrine of forum non conveniens, the initial briefing to the Texas Court of Appeals was directed solely to that issue. The three-judge panel of the Court of Appeals held, with one judge dissenting, that section 71.031 of the Texas Civil Practice and Remedies Code and its statutory predecessors had abolished the common-law doctrine of forum non conveniens in Texas. The decision of the First Court of Appeals is styled *Alfaro v. Dow Chemical*, 751 S.W.2d 208 (Tex. App. – Houston [1st Dist.] 1988), and was reproduced as Appendix 2, at App. 89-98.

The majority opinion of the Court of Appeals did not address the federal due process issue. *See* 751 S.W.2d at 208-11; Appendix 2, at App. 89-97. However, in dissent,

Justice Duggan of the Texas Court of Appeals argued that the majority's decision would subject § 71.031 to "well-deserved due process attacks." *See* 751 S.W.2d at 211; Appendix 2 at App. 97.

After the decision of the majority of the Court of appeals panel holding that forum non conveniens was no longer available in Texas, petitioners renewed their federal due process arguments in their motions for rehearing before the Court of Appeals. Relevant portions of Dow's motion for rehearing were reproduced as Appendix 10, at App. 122-26. Relevant portions of Shell's motion for rehearing were reproduced as Appendix 11, at App. 127-31. The Texas Court of Appeals overruled petitioners' motion for rehearing without issuing an opinion, thereby implicitly rejecting petitioners' due process arguments.

Petitioners appealed to the Supreme Court of Texas by filing separate applications for writ of error with that court on July 18, 1988. Petitioners again raised the federal due process argument in their applications for writ of error to the Supreme Court of Texas. Relevant portions of Dow's application for writ of error were reproduced as Appendix 12, at App. 132-35. Relevant portions of Shell's application for writ of error were reproduced as Appendix 14, at App. 136-39.

The Supreme Court of Texas, with four justices dissenting, affirmed the decision of the First Court of Appeals that the common law doctrine of forum non conveniens had been abolished in Texas. The Texas Supreme Court's decision is styled *Dow Chemical v. Alfaro*, 786 S.W.2d 674 (Tex. 1990), and was reproduced as Appendix 1, at App. 1-88.

Despite the fact that a substantial portion of petitioners' applications for writ of error were devoted to the federal question that petitioners seek to bring before this Court, the majority opinion of the Supreme Court of Texas failed to address petitioners' due process arguments. *See* 786 S.W.2d at 674-79; Appendix 1, at App. 1-12. However, the concurring opinion of one Justice of the Supreme Court of Texas addressed petitioners' federal due process claim, albeit in terms of minimum contacts. *See* 786 S.W.2d at 685 n.8; Appendix 1, at App. 28-30 (Doggett, J., concurring).

Another Justice of the Texas Supreme Court, in a dissenting opinion, argued at length that the decision of the majority of the Texas Supreme Court "allows assertions of personal jurisdiction by Texas courts that are so unfair and unreasonable as to violate the due process clause of the federal constitution." 786 S.W.2d at 697; Appendix 1, at App. 60 (Cook, J., dissenting).

Petitioners timely requested rehearing before the Texas Supreme Court, and again raised the federal question sought to be reviewed in their joint motion for rehearing before the Supreme Court of Texas. Relevant portions of this motion were reproduced as Appendix 14, at App. 140-48. The order denying petitioners' motion for rehearing did not address the federal question raised by petitioners. *See* Appendix 4, at App. 102-04.

Contrary to respondent' assertions, therefore, the federal due process claim that petitioners seek to have this Court review were raised at *every possible stage* of the proceedings before the Texas courts. These arguments were made (1) before the 61st Judicial District Court of Harris County, (2) before the Texas Court of Appeals for the First Supreme Judicial District, and (3) before the

Supreme Court of Texas. In addition, petitioners' federal due process arguments were expressly considered by one Justice of the Texas Court of Appeals (Duggan, J., dissenting) and by two Justices of the Supreme Court of Texas (Doggett, J., concurring, and Cook, J., dissenting).

No more is required under this Court's precedents. Indeed, well-established precedent from this Court makes it clear that far less will suffice to present a constitutional issue to the State courts for review.

For example, in *Hawthorne v. Lovorn*, 457 U.S. 255, 262-65 (1982), this Court held that raising an argument for the first time in petition for rehearing to the Mississippi Supreme Court was sufficient to preserve review when the Mississippi Supreme Court occasionally considered arguments raised for the first time in a petition for rehearing. *See also Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988) (stating that if petitioner had raised constitutional claims in the Mississippi Supreme Court in a motion for rehearing this would have been sufficient). Petitioners here did far more than required by this Court's precedents to have effectively presented their constitutional claims to the Texas courts. Review of these claims in this Court is plainly proper.

2. THE RECORD BELOW CONTAINS SUBSTANTIAL EVIDENCE OF THE DISCOVERY AND TRIAL PROBLEMS WHICH WOULD OPERATE TO DENY PETITIONERS DUE PROCESS OF LAW.

The record below establishes that the inability of Dow and Shell to join proper third parties or to do necessary discovery fundamental to their defense puts them at a distinct and severe disadvantage in comparison to respondents, who will be able to selectively produce

and rely upon evidence from Costa Rica and also have the benefit of full discovery from petitioners under the Texas Rules of Civil Procedure. Contrary to respondents' assertions, petitioners offered a substantial amount of evidence to the Texas courts concerning the distinct disadvantage relative to respondents that petitioners would be in if this case is tried in Texas.[1]

For example, on June 26, 1984, petitioner Dow submitted the affidavit of Ronald L. Davis to the trial court. Mr. Davis' affidavit is reproduced as Supplemental

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[1] Respondents brief is so replete with misstatements of fact and statements unsupported by the record in this case that petitioners cannot possibly respond to all of them in the limited space permitted here. For example, respondents' assertion that petitioners continued to ship DBCP to Costa Rica after it was banned in the United States is patently false.

Shell made no sales of DBCP product to Standard Fruit after 1970 and those sales have never been traced to Costa Rica. TR. 86-89. Dow stopped shipping to Standard Fruit sometime prior to November, 1978. TR. 23, 31, and 96.

The United States EPA permitted use of DBCP in the United States on many crops, including bananas, until October 29, 1979, when it limited use of DBCP in the United States to the Hawaiian Islands for use on pineapples. *See* 44 Fed. Reg. 65135 at 65169 (Nov. 9, 1979). The EPA banned any use of DBCP in the United States on October 23, 1985. *See* 50 Fed. Reg. 46512 (Nov. 8, 1985).

The Costa Rican government apparently banned or limited the use of DBCP on crops, including banana crops, in December, 1978, a full year before *more limited* action was taken in the United States. Affidavit of Dr. Carlos E. Dominguez, Tr. 550-551. The evidence is clear that at the time of the sale of their DBCP product neither Shell nor Dow were "dumping" pesticides banned for use in the United States in Costa Rica as their sales of DBCP to Standard Fruit Company ended before the Costa Rican government prohibited use of DBCP in Costa Rica in December, 1978.

Appendix 2 at S. App. 4-9 (Tr. 8-12). In his affidavit, Mr. Davis set forth in detail the Costa Rican residents that Dow would interview and possibly depose who were outside the compulsory process jurisdiction of the Texas trial court. S. App. 6-7 (Tr. 9-10). Mr. Davis also stated that Dow would want to depose Costa Rican doctors and hospital staff, who were also outside the scope of the Texas court's process. S. App. 7 (Tr. 10).

Similarly, petitioner Shell submitted an affidavit of Burt Ballanfant setting forth the discovery that Shell would be unable to take in Costa Rica, including discovery concerning the respondents' medical records, supervisors, fellow employees, employees of third companies, doctors, and family members. A copy of Mr. Ballanfant's affidavit is reproduced as Supplemental Appendix 3 at S. App. 10-14 (Tr. 13-16).

Petitioners also submitted evidence to the Texas trial court of specific difficulties that they had encountered in attempting to obtain basic information that respondents had ready access to. For example, Shell submitted an affidavit of Burt Ballanfant, who described his unsuccessful attempt to obtain an affidavit from one of respondents' treating physicians, Dr. Rosabal Guevara. A copy of Mr. Ballanfant's affidavit is reproduced as Supplemental Appendix 4 at S. App. 15-16 (Tr. 782). Respondents, however, were successful in obtaining an affidavit of Dr. Guevara, which was favorable to their position. A copy of Dr. Guevara's affidavit is reproduced as Supplemental Appendix 5 at S. App. 17-18 (Tr. 328-29). Of course, Shell cannot depose Dr. Guevara concerning his affidavit.

In addition, petitioners submitted the affidavit of Jose A. Berlanga who described a one-year effort to

obtain basic information from the Costa Rican government concerning the filing of workers compensation claims by the respondents. Mr. Berlanga's affidavit is reproduced as Supplemental Appendix 6 at S. App. 19-21 (Tr. 328-29). The meager information obtained from the Costa Rican government after a year of effort is reproduced as Supplemental Appendix 7 at S. App. 22-24 (Tr. 382-84).

Petitioners also offered evidence that their defense would be impaired because they would be unable to join third-parties who are not subject to the jurisdiction of the Texas trial court. Affidavit evidence on this issue was submitted to the trial court. *See* Affidavit of Ronald L. Davis, Supplemental Appendix 2 at S. App. 8 (Tr. 11); Affidavit of Burt Ballanfant, Supplemental Appendix 3 at S. App. 13 (Tr. 15). In addition to the respondents' employer, petitioners offered evidence to the trial court that they might need to implead other Costa Rican parties. In an affidavit, Jane M. Gootee, a Dow lawyer, stated that Dow might want to bring the designers, sellers, and maintainers of the injector device that the respondents allegedly used to apply DBCP and any Costa Rican repackagers of the DBCP into the action as third-party defendants. Ms. Gootee's affidavit is reproduced as Supplemental Appendix 8 at S. App. 25-33 (Tr. 712-19).

In short, the evidence before the trial court amply demonstrates that petitioners will be denied access to sources of proof essential to their defense. Respondents all but admit in their response that not all of the respondents' treating doctors will be available for examination by Dow and Shell, but argue that producing the respondents for medical examination under the Texas Rules of Civil Procedure somehow cures this problem. Response

at 8 ("most" of respondents' treating physicians will appear in Houston). It goes without saying that a medical examination in Houston years after the respondents' alleged exposure is an extremely poor substitute for being able to question and obtain the records of the physicians who treated the respondents for their alleged injuries many years ago. In these types of cases in particular, the chronological development of the respondents' alleged infertility problem is vital to determining the issue of causation, and can be established only through a complete review of *all* medical records and interviews with all treating doctors. In addition, for any respondents claiming only temporary or past injuries or effects, a future medical examination is no substitute at all for medical records and testimony of treating doctors.

Similarly, respondents concede in their response that all of the respondents' medical records will be not produced, and attempt to argue that since respondents have the burden of proof, this is their problem, not Dow's and Shell's. Response at 8-9. This argument assumes that these medical records will be favorable to respondents, and will support respondents' theory that Dow and Shell caused their alleged injuries. However, if the respondents' Costa Rican medical records are not favorable to their claims, such records are obviously crucial to Dow and Shell's defense. Again, the respondents merely offer the inadequate remedy of an independent medical examination in Houston, years after the alleged onset of the respondents' injuries.

The evidence presented to the trial court establishes that the sum of these disadvantages will operate to deprive petitioners of due process of law. To prevent this

Constitutional violation, petitioners Dow Chemical Company and Shell Oil Company request that the Court grant their petition for writ of certiorari and, after full briefing and argument, issue a final decision reversing the judgment of the Supreme Court of Texas in this case.

Respectfully submitted,

F. Walter Conrad
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1234

Counsel for Petitioner
Dow Chemical Company

Burt Ballanfant
Shell Oil Company
4794 One Shell Plaza
P.O. Box 2463
Houston, Texas 77252
(713) 241-7023

Counsel for Petitioner
Shell Oil Company

SUPPLEMENTAL APPENDIX 1

Shell's Renewed Motion For Dismissal Filed On March 3, 1987

[Transcript pp. 197-208]

DEFENDANT SHELL OIL COMPANY'S RENEWED MOTION FOR DISMISSAL WITHOUT PREJUDICE ON GROUNDS OF FORUM NON CONVENIENS, FILED: MARCH 3, 1987, RAY HARDY, District Clerk, Harris County, Texas. BY: M. Flores, Deputy.

NO. 84-17171

DOMINGO CASTRO ALFARO, ET AL.,	§	IN THE DISTRICT COURT
	§	FOR THE COUNTY OF
Plaintiffs,	§	HARRIS, TEXAS
	§	
vs.	§	61ST JUDICIAL DISTRICT
	§	
DOW CHEMICAL COMPANY, ET AL.,	§	
	§	
Defendants.	§	

DEFENDANT SHELL OIL COMPANY'S RENEWED MOTION FOR DISMISSAL WITHOUT PREJUDICE ON GROUNDS OF FORUM NON CONVENIENS

* * *

The Due Process Clause of the Fifth Amendment is "essentially a recognition of the principles of justice and fundamental fairness in a given set of circumstances". *Honeywell Inc. v. Metz Apparatewerke*, (7th Cir. 1975) 509 F.2d 1137, 1143. It would be fundamentally unfair to allow this matter to proceed any further in Texas.

Defendants' constitutional rights would be violated during the discovery phase of this action. While plaintiffs

would have the full authority of this Court with which to compel discovery and enforce discovery obligations, defendants would have no such authority backing their efforts to discover information which is known to Costa Rican witnesses or contained in documents located in Costa Rica. Thus, it is not inconceivable that defendants would find it virtually impossible to investigate and prepare their defense of this matter while plaintiffs would be able to compel complete disclosure of all relevant information in defendant's possession. As an example of the unfairness of this situation, the discovery and investigation conducted in this case to date shows that while plaintiffs initially denied that they had filed a workers compensation claim in Costa Rica, the records of the Costa Rican Instituto Nacional de Seguros (INS) reflected that such claims had actually been filed. An affidavit which took almost one full year to obtain. (Affidavit of Jose Berlanga, attached hereto as Exhibit K.)

Similarly, defendant's constitutional rights would be violated during the trial of this action. While plaintiffs would be free to subpoena witnesses and documents for trial, defendants would have no means of compelling the attendance of witnesses or documents located in Costa Rica. It is thus highly possible that defendants would be unable to mount a full defense in this matter. It was this apparent inequity which caused the Illinois appellate court to reverse a six month trial on the basis of forum non conveniens. *Lowe v. Norfold and Western Ry. Co.*, 463 N.E. 2d 792 (Ill. App. Ct. – 1984).

CONCLUSION

The discovery taken in this case, the precedent of two cases *identical* to this case, and the total lack of connection of Harris County to this litigation mandates that this Court should dismiss this case without prejudice to its being refiled in Costa Rica on the basis of forum non conveniens.

Respectfully submitted,

/s/ Burt Ballanfant
Burt Ballanfant
State Bar No. 01647000
4794 One Shell Plaza
P. O. Box 2463
Houston, Texas 77001

Jose' A. Berlanga
State Bar No. 02203400
4708 One Shell Plaza
P. O. Box 2463
Houston, Texas 77001

ATTORNEYS FOR DEFENDANT
SHELL OIL COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant Shell Oil Company's Renewed Motion for Dismissal Without Prejudice on Ground of Forum Non Conveniens has been served upon attorneys of record in this case, by mailing certified return receipt requested on this 3rd day of March, 1987.

/s/ Burt Ballanfant
Burt Ballanfant

SUPPLEMENTAL APPENDIX 2

Affidavit In Support Of
Dow's Motion To Dismiss
Filed On June 26, 1984

[Transcript pp. 8-12]

DOW AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS, SERVED JUNE 21, 1984, FILED: JUNE 26, 1984, RAY HARDY, District Clerk, Harris County, BY Moore, Deputy.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DOMINGO CASTRO ALFARO, et al.	§	
v.	§	C.A. No. H-84-2249
THE DOW CHEMICAL CO., et al.	§	FILED JUN 26 1984

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

COMES NOW The Dow Chemical Company and in support of the Motion to Dismiss filed herein by Shell Oil Company and The Dow Chemical Company submits the attached affidavit in support of said motion. The Motion to Dismiss has been set for hearing by the Court on August 8, 1984.

Respectfully submitted,

/s/ F. Walter Conrad
F. Walter Conrad

OF COUNSEL:

BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1230

CERTIFICATE OF SERVICE

I hereby certify that on this 21 day of June, 1984 a true and correct copy of the foregoing was served on counsel for plaintiff by certified mail, return receipt requested, and on all other counsel of record by regular mail.

/s/ F. Walter Conrad
F. Walter Conrad

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

DOMINGO CASTRO ALFARO, ET AL.

Plaintiffs,

vs.

THE DOW CHEMICAL COMPANY, SHELL OIL COMPANY AND AMVAC CHEMICAL CORPORATION,

Defendants.

Case No. 842249

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

The State of Michigan, County of Midland, Ronald L. Davis, upon his oath, hereby deposes and says:

1. That I am the Manager of Claims and Litigation Section of the Legal Department of The Dow Chemical Company, one of the defendants in the above-captioned matter, and as such am fully familiar with the facts and circumstances as set forth below.

2. That this matter, if tried in the Southern District of Texas, would be extremely burdensome and inconvenient since, as Plaintiffs allege, Plaintiffs were exposed to the allegedly dangerous product while in the course of their employment in Costa Rica. In light of this fact, Defendant, The Dow Chemical Company, would need to locate and interview, in Costa Rica, the following:

(a) Plaintiff's employer.

(b) Agents of Plaintiff's employer responsible for supervision of the operation of the employer's plant.

(c) Agents or independent contractors of the employer responsible for the design and plan of the production line at which Plaintiffs were working when they were allegedly exposed to Defendant's product.

(d) Suppliers of Plaintiffs' employer.

(e) Co-employees of the Plaintiff.

(f) Those responsible for the maintenance and servicing of the Plaintiffs' place of employment.

(g) Others that might turn up in an investigation.

All of the above are outside the scope of compulsory process of the Southern District of Texas. Thus, conducting investigations and interviews of the above witnesses would be extremely burdensome or impossible.

3. That Defendant, The Dow Chemical Company, would want to view the scene of alleged exposure and investigate the records of the Plaintiffs' employer; and this would be burdensome or impossible since plaintiffs' employer is without the scope of compulsory process of this court.

4. That Defendant, The Dow Chemical Company, would want to depose doctors, and perhaps hospital staff with regard to the Plaintiffs' alleged injuries. Again, such people are without the scope of the process of this court.

5. That since the alleged exposure occurred in Costa Rica, any matters bearing on this case that investigation might turn up are likely to be in Costa Rica. Thus, every time Defendant, The Dow Chemical Company, might want to investigate an aspect of this case, it would be put

to great hardship since it would not have the benefit of compulsory court process. This would put Plaintiffs at an unfair advantage.

6. That Defendant, The Dow Chemical Company, would want to implead others as third-party defendants who might be liable in some degree for any recovery in this matter, such as Plaintiffs' employer; and that such parties are Costa Rican residents with no United States connection and thus not subject to process or jurisdiction in any United States district. If The Dow Chemical Company was to later sue these parties in a Costa Rican court, there is a clear danger of inconsistent verdicts.

7. That under the above circumstances, it would be extremely burdensome for The Dow Chemical Company to defend its action, if not impossible in some respects. Moreover, The Dow Chemical Company would not be able to implead potential third parties who may also be liable in some degree, and thus, The Dow Chemical Company would be subject to bearing a disproportionate amount of any judgment that might be rendered in this matter.

Wherefore, your deponent respectfully requests that the honorable court dismiss this action since a much more convenient and less burdensome alternative forum exists.

FURTHER AFFIANT SAITH NOT.

/s/ Ronald L. Davis
Ronald L. Davis
Manager of Claims and Litigation

STATE OF MICHIGAN)
) SS.
COUNTY OF MIDLAND)

Sworn to and subscribed before me this 23rd day of May, 1984.

/s/ Faye E. Yarnell
Notary Public
FAYE E. YARNELL
NOTARY PUBLIC, BAY COUNTY,
MICHIGAN ACTING IN
MIDLAND COUNTY
MY COMMISSION EXPIRES
JUNE 10, 1984

SUPPLEMENTAL APPENDIX 3

Affidavit In Support Of Shell's Motion To Dismiss Filed On July 18, 1984

[Transcript pp. 13-16]

SHELL AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS, FILED JULY 18, 1984, RAY HARDY, District Clerk, Harris County, Texas. BY: F. Moore, Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DOMINGO CASTRO ALFARO, et al.,	§	
Plaintiffs,	§	C.A. No.
v.	§	H-84-2249
SHELL OIL COMPANY, et al.,	§	Filed
Defendants.	§	JUL 18 1984

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

COMES NOW Shell Oil Company and in support of the Motion to Dismiss filed herein by Shell Oil Company submits the attached affidavit in support of said motion. The Motion to Dismiss has been set for hearing by the Court on August 8, 1984 and a Motion to Reset Hearing is pending before the Court.

Respectfully submitted,

/s/ Burt Ballanfant
Burt Ballanfant

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Affidavit in Support of Motion to Dismiss has this day been delivered by Certified Mail, Return Receipt Requested, postage prepaid, to the attorney of record Mr. Russell W. Budd, Baron & Associates, 1050 Dallas Federal Savings Tower, Dallas, Texas 75225 and Mr. Clayton Devin, Cowles, Sorrells, Patterson & Thompson, One Main Place, Dallas, Texas 75250, and Mr. Walter Conrad, Baker & Botts, One Shell Plaza, Houston, Texas 77002 on this, the 16th day of July, 1984.

/s/ Burt Ballanfant
Burt Ballanfant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DOMINGO CASTRO ALFARO,
ET AL.,

Plaintiffs,

vs.

DOW CHEMICAL CO., ET AL.,

Defendants.

CIVIL ACTION
NO.
H-84-2249

/

AFFIDAVIT

Comes now Burt Ballanfant and states under oath that he is an attorney licensed to practice law in the State of Texas since 1972 and is the attorney responsible for the conduct of Shell's defense in DBCP litigation and that he has been trial counsel for Shell in the only two cases involving DBCP litigated to a jury verdict.

Based upon my DBCP trial experience, knowledge of the medical and toxicological literature pertaining to DBCP, and the implications in plaintiffs' complaint as to the circumstances of their exposure it is my belief that among the pivotal issues in this litigation will be:

(1) the extent of plaintiffs' exposure as described by themselves, their co-workers and their supervisors;

(2) a complete medical and fertility history of both spouses since puberty;

(3) a comprehensive exploration of the plaintiffs' overall lifestyle;

(4) a full exploration of the industrial hygiene practices at the site of plaintiffs' employment including but not limited to use of protective equipment and of trained professionals in the area of industrial hygiene;

(5) bills of lading showing the source, time of receipt, and use of the product.

The witnesses and records pertaining to these issues such as medical records, supervisors, fellow employees, employees of third companies, doctors, and family members would probably reside in Costa Rica. Their susceptibility to compulsory process in the United States is nonexistent. The absence of their testimony would fundamentally prejudice the defense of these cases by Shell Oil Company.

Furthermore, a supplier manufacturer defendant such as Shell Oil Company would seriously consider third party actions for contribution, indemnity, and comparative fault against employers, unions, and possible intermediate processors all of whom are or probably are residents of Costa Rica and not susceptible to process in the United States.

/s/ Burt Ballanfant
Burt Ballanfant
Attorney for Shell Oil Company

Signed and sworn to before me by Burt Ballanfant on July 16, 1984, to certify which witness my hand and seal of office.

/s/ Jacqueline M. Wagner
NOTARY PUBLIC IN AND
FOR THE STATE OF TEXAS

JACQUELINE M. WAGNER
Notary Public in and for the State of Texas
My Commission Expires March 5, 1985

SUPPLEMENTAL APPENDIX 4

Affidavit Of Burt Ballanfant
In Support Of Shell's Motion
For Sanctions Filed April 21, 1987

[Transcript p. 782]

STATE OF TEXAS)
)
COUNTY OF HARRIS)

AFFIDAVIT OF BURT BALLANFANT

BEFORE ME, the undersigned authority, personally appeared Burt Ballanfant, who being by me duly sworn, deposed and said:

My name is Burt Ballanfant. I am currently employed as a litigation staff attorney by Shell Oil Company and have held this position since April, 1980. I was admitted to the State Bar of Texas in 1972, am a member in good standing and have never been the subject of any disciplinary action. One of my responsibilities as trial counsel for Shell Oil Company is supervision and conduct of litigation concerning Shell's DBCP product. In preparation for this litigation involving DBCP by these Costa Rican banana workers I attempted to obtain an affidavit from Dr. Rosabal Guevara which he refused to give.

/s/ Burt Ballanfant
Burt Ballanfant

SUBSCRIBED AND SWORN TO BEFORE ME on the 21st day of April, 1987, to certify which witness may [sic] hand and seal.

/s/ Kathleen W. Blackmor
Notary Public in and for
Harris County, Texas

My commission expires 6-23-90.

Exhibit A

SUPPLEMENTAL APPENDIX 5

Translation Of Affidavit Of Fernando Rosabal Guevara

Dated March 20, 1987

[Transcript p. 445]

No. 078529 C

SWORN AFFIDAVIT

The undersigned, FERNANDO ROSABAL GUEVARA, of legal age, divorced, resident of San José, ID No. two – one hundred seventy – four hundred ninety-seven, a surgeon and urology specialist, duly registered with the Costa Rican College of Physicians and Surgeons of Central America, hereby swear the following: 1. I performed professional services as a urology specialist for the Occupational Hazards Department of Costs Rican Nation 1 Insurance Institute, during which time I was assigned to examine all the patients employed by Standard Fruit Company that had been referred by the Costa Rican Social Security Clinic at Río Frío de Sarapiquí with a history of exposure to or contact with dibromochloropropane (DBCP) under the tradenames of Nemagón and Fumazone and low sperm counts. 2. I examined approximately 80 patients. 3. I obtained complete clinical histories and lab tests for each patient, including blood, toxicology, liver and kidney tests. 4. Since there can be several causes of sterility, I first suspected but later determined that these cases were not caused by alcoholism, congenital defects, impotence, smoking or drug abuse. 5. I did not come to a reasonable medical conclusion that these patients were suffering

from damage attributable to DBCP until nineteen hundred eighty-three. 6. I did not inform any of my patients about this conclusion until around the end of nineteen eighty-three. 7. Around the latter part of nineteen eighty-three, I informed these patients that their low sperm count could be due to any of several factors and that they might improve with treatment. 8. I did not arrive at a reasonable medical certainty that the oligospermia or azoospermia of these patients was irreversible and caused by DBCP until it became clear that these patients were suffering from Sertioli's syndrome, i.e., atrophy of the testicles. This was proved by biopsies of the testicles prior to final diagnosis. 9. At the conclusion of testing, these patients did not know the exact chemical causing their problems nor did a reasonable medical probability exist that a chemical used on the job was the cause of their problems. They did not know that the condition was irreversible, nor did they know the real medical cause. 10. I make these statements under oath and am therefore prepared to give testimony to the foregoing at any time in Houston, Texas, USA.

signed and sworn at 2 PM on this the twentieth day of March in the year nineteen hundred eighty-seven.

[Fernando Rosabal Guevara]

SUPPLEMENTAL APPENDIX 6

Affidavit Of Jose A. Berlanga
In Support Of Shell's Motion To Dismiss
Filed On March 3, 1987

[Transcript pp. 328-29)

EXHIBIT K

NO. 84-17171

DOMINGO CASTRO ALFARO, et al., Plaintiffs, v. DOW CHEMICAL COMPANY and SHELL OIL COMPANY Defendants.	§ § § § § § § § §	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 61ST JUDICIAL DISTRICT

STATE OF TEXAS)
)
COUNTY OF HARRIS)

AFFIDAVIT OF JOSE A BERLANGA

I, Jose A. Berlanga, being first duly sworn, depose and say as follows:

1. I am presently employed by the Shell Oil Company as a staff attorney in the Litigation Section of the Legal Department. I have held this position since October of 1982.

2. I am a member in good standing of the State Bar of Texas and have never been the subject of any disciplinary action. I was admitted to practice in the state of Texas in 1977. I am also eligible to practice before the Court of

Appeals for the Fifth Circuit and United States District Court of the Southern District of Texas.

3. I am co-counsel for the Shell Oil Company in the case of *Alfaro, et al. v. Dow Chemical Co., et al.* presently pending before the 61st Judicial District Court, Harris County, Texas.

4. After Shell filed its initial discovery request on November 14, 1985, seeking information related to the knowledge of the plaintiffs as to their cause of action, I received and reviewed their answers which I determined to be non-responsive.

5. I therefore initiated attempts to obtain the same basic information from the Costa Rican government.

6. The information reflected in the Affidavit of Jorge Hernandez Ramirez reflects almost a full year of effort which included one (1) trip to Costa Rica.

7. The delay and difficulty encountered merely to obtain basic information related to the filing of workers compensation claims from the plaintiffs and foreign governmental agencies demonstrates the fundamental prejudice to Shell's ability to prepare and present a defense in this forum.

Further Deponent sayeth not.

/s/ José A. Berlanga

SWORN AND SUBSCRIBED TO before me this 12th day of February, 1987.

/s/ Debra E. Walker
Notary Public for the
State of Texas

My commission expires
10/9/89

SUPPLEMENTAL APPENDIX 7

Translation Of Affidavit Of Jorge Hernandez Ramirez

Dated September 16, 1986

[Transcript pp. 382-84]

PAGE 1
NO. 160698 A-4

RT-86-1226. Lic. Jorge Hernández Ramírez, Director of the Comprehensive Insurance Department of the National Insurance Institute, duly commissioned and qualified for this act, as shown in the Public Register of Commerce Vol. 351, Folio 37, Entry 3, certifies: THAT having checked the records of the Department of Occupational Hazards, accidents have been reported which were suffered by the following persons while they worked for Standard Fruit Company.

Name	Claim Date	Disability Percentage
Castro Alfaro Domingo	5/27/81	20%
Campos Alpízar Ismail	6/27/80	15%
Morera Alvarado Ovidio	6/17/83	20%
Morera Alvarez Alvaro	1/15/78	3%
Hernández Badilla Jesús	2/ 5/81	20%
Herra Barboza Efraín	6/17/86	20%
Salazar Carballo Claudio	3/26/82	20%
Vázquez Carrillo Jorge	4/13/81	20%
Dinarte Castro Joel	7/16/80	15%
Zamora Castro Sergio	12/18/81	20%
Nuñez Céspedes Alcibiades	5/11/83	20%
Sánchez Oses Mario	3/26/85	15%
Pérez Espinoza Gregorio	4/21/81	20%
Arias Fallas Francisco	2/14/80	20%
Garita Garita Rigaberto	2/16/78	20%
Gómez Gómez Manuel	10/15/81	20%

Morera González Francisco	3/10/81	20%
Vega Granados Andrés	6/ 9/80	20%
Bermúdez Herneández Alfredo, k.e.: Hernández Vergas Alfredo	9/10/80	10%
Figueroa Matarrita Juan	12/ 9/80	15%
Núñez Moye Uriel	2/10/81	20%
Cartín Araya Olger	7/22/85	20%

PAGE 2

[RT-R6-1226, page 2]		
Salas Núñez Ismael	10/17/86	20%
Vega Pérez Jorge	7/ 1/80	20%
Ramírez Ramírez Francisco	1/14/81	20%
Guevara Reyes Vicente	4/20/81	20%
Espinoza Rodríguez Gerardo	4/ 7/81	20%
Zumbado Sales Daniel	8/ 1/80	10%
Zumbado Salas Mario	7/ 7/81	20%
Morales Salzar Rubén	1/ 8/85	20%
Sibaja Soto José	7/ 7/81	20%
Elizondo Umaña Elei	5/21/80	40%
Flores Valverde Vicente Manuel	5/21/80	40%

That the above mentioned workers received compensation in accordance with the criteria of our Department of Health Services for Azoospermia. Given in San José, Costa Rica, at the request of Shell Chemical Company, a Division of Shell Oil Company, on August the nineteenth of the year one thousand nine hundred and eighty six

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Prepared by: MTDES (Signature)
Revised by: GBA (Signature)

AUTHENTIC: SIGNED AND SEALED
Lic. Roberto Zaldívar
Attorney and Notary

SEALED: BAR ASSOCIATION
REPUBLIC OF COSTA RICA

I CERTIFY that the signature above is that of Licenciado Roberto Zaldívar Gómez, as recorded in Folio 2539 of Volume VIII of the Roster of Attorneys registered as members of this Association for the practice of that profession of Attorney. San José, 16 September 1986.

This certification involves no responsibility as to the document's content. IT IS PART OF THE DOCUMENT WHEREIN THE ATTORNEY'S SIGNATURE WHICH IT VALIDATES IS CONTAINED.

SIGNED: (Signature illegible)
Secretary

[OBVERSE OF PRECEDING CERTIFICATION]

Republic of Costa Rica
Department of Foreign Relations and Religious Affairs

The above signature, of Mr. Hernán Vega M., Vice-President of the Bar Association, is authentic.

San José, 19 September 1986

This certification involves no responsibility as to the document's content.

SIGNED: Ms. Ileana Duran
Ileana Duran Barquero,
Certification Officer

SUPPLEMENTAL APPENDIX 8

Affidavit Of Jane M. Gootee

Dated April 15, 1987

[Transcript pp. 712-719]

STATE OF MICHIGAN)
) SS.
COUNTY OF MIDLAND)

AFFIDAVIT

I, JANE M. GOOTEE, declare as follows:

I am an attorney at law and have been a member of the Legal Department of The Dow Chemical Company ("Dow") since 1979. I was the attorney responsible for all claims and lawsuits involving the chemical 1, 2-dibromo-3-chloropropane ("DBCP") brought against The Dow Chemical Company up to January 1, 1987.

As an attorney at Dow, my duties have included the supervision of defense efforts on behalf of Dow in certain litigation involving DBCP. I have become familiar with the issues, evidence and witnesses which are critical to a proper defense of a lawsuit wherein personal injuries have been claimed as a result of DBCP exposure.

The literature on DBCP establishes that its toxicity follows a dose/response curve as do all toxins. That is, the degree of harm resulting from exposure to DBCP, if any, is proportional to the dose. My experience in other DBCP litigation establishes that it is necessary to ascertain all facts surrounding the circumstances of exposure in order to secure expert opinion concerning the response that one would expect. This would include the amount of

DBCP to which one is exposed, the length of exposure, the frequency of exposure, [and the route, that is, whether by ingestion, inhalation or dermal contact.

In order to defend itself in this action, Dow would have to develop evidence respecting each individual's exposure which would come exclusively from Costa Rican witnesses including the plaintiffs, their co-workers and supervisors and their employment records. Undoubtedly, other Costa Rican witnesses such as employees of other employers present at the banana plantations would also have direct eyewitness knowledge of the dose, length of exposure, frequency of exposure and exposure route.

Dow would attempt to show as part of its defense to this action that its labels, in English and Spanish, adequately warned of the dangers of DBCP through all routes of exposure, ingestion, inhalation and dermal contact. Costa Rican witnesses would have to establish whether each plaintiff and/or their employers read and understood the labels. If the plaintiffs read the labels, were they allowed to work in such a manner as to comply with label warnings? If the plaintiffs are illiterate, were the label instructions read and followed by their supervisors and/or co-workers?

DBCP was distributed to many areas of the United States for many years in much greater quantities than ever used in Costa Rica. There has been no evidence of widespread health problems among American agricultural workers and DBCP obviously was used on a

regular basis in this country without]* adverse health affects [sic]. A number of lawsuits have been brought by DBCP factory workers, but only two have been brought claiming injury from agricultural work with DBCP. If, in fact, a number of Costa Rican workers had adverse affects in the agricultural use of DBCP, this would undoubtedly be due to differences between agricultural practices in the United States and those in Costa Rica. In order to defend itself, Dow would have to investigate thoroughly through Costa Rican witnesses the agricultural practices followed in the banana plantations where the plaintiffs were employed. Differences in occupational hygiene practices, the reasons therefore, and whether Dow is arguably responsible for these would form a major part of Dow's defense efforts. All of the evidence relating to agricultural practices and occupational hygiene would be located in Costa Rica and would be established through Costa Rican witnesses and documentary evidence.

In the United States, DBCP was often applied by persons other than the farmer or the farmer's employees. This also may have been the case in Costa Rica. Dow would have to develop evidence relating to these third-party applicators. If the third-party applicators conducted themselves negligently and failed to comply with label instructions, they would be potential third-party defendants and Dow should have the right to cross-complain against them. For instance, if a third-party applicator used too much DBCP and allowed the plaintiff plantation

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* This portion of Ms. Gootee's affidavit, which was page two of the original affidavit, was submitted to the trial court but does not appear in the official transcript on appeal.

workers to enter the fields when the exposure to DBCP was likely, this could provide the causal link for any injury.

Dow had no control over the methods and manner of application in Costa Rica. Whether DBCP was applied in a manner, or improperly so as to expose the workers to substantial amounts of the chemical, is dependent on the activity of Costa Ricans and evidence relating thereto is to be found in Costa Rica. For instance, in the United States DBCP was generally applied through irrigation water or a chisel implement that was towed behind a tractor. It is my understanding that another method involving a hand-held injector device was used often in Costa Rica.

In order to defend itself, Dow would have to pursue Costa Rican witnesses who could explain the design, manufacture, development and use of this injector device. Dow would want to know not only how the injector device was designed to work, but also how it actually performed in practice. Dow would seek information, through Costa Rican workers, as to whether the device, as designed, would adequately protect the worker from inhalation, ingestion and dermal exposure. Even if designed properly, Dow would seek by way of defense to develop whether the device when used in practice adequately protected the worker. This would include investigation into how the device was calibrated, whether the devices wore out and leaked, and whether the device allowed DBCP vapors to be breathed by the worker or DBCP liquid to contact the skin. All of this investigation into the use and performance of the injector devices would be through Costa Rican witnesses and documents.

To the extent that the devices as designed or as maintained and operated in the field improperly exposed workers to DBCP, Dow would seek to cross-complain against the third-party designers, sellers, and maintainers of the devices. Most, if not all of these third-parties would likely be Costa Rican.

Dow does not know whether its DBCP products were actually used or repackaged in Costa Rica, or the amount, if any, of use or repackaging. If they were, a question of the adequacy of the labels on the new package would obviously involve investigation in Costa Rica and if a Costa Rican entity or person were found to have improperly labelled the repackaged product, Dow would seek to cross-complain against these parties also.

Assuming that there was exposure to DBCP, the fact of injury and cause thereof are very complicated issues which require testimony by many witnesses and investigation into many documents. In this case, those witnesses and documents would be located in Costa Rica.

There is evidence that the workers at United States industrial plants where DBCP was manufactured and formulated and who had substantial and continuous exposure to the material, experienced fertility problems. However, litigation involving these industrial workers has established that diagnosis and causation in these cases are complex issues.

Assuming that these plaintiffs are claiming fertility problems, the fact that children are not forthcoming in a particular marriage is only the beginning of an appropriate inquiry. In fact, many couples cannot have children but only a minute fraction of fertility problems can be

traced to DBCP. Many other factors can explain a childless marriage.

Claims of infertility by these plaintiffs would involve a multi-step process to establish whether the cause of a childless marriage is infertility on the part of the husband, whether this infertility is due to germinal cell aplasia, the condition which DBCP can cause, and whether in a particular case the germinal cell aplasia is due to DBCP or other factors. Costa Rican witnesses and documents would be involved at each step of this inquiry.

The first question is whether a childless marriage is due to a low sperm count in the husband's ejaculate. This question is answered through a laboratory semen analysis. Since levels of sperm vary in any individual from time to time, in order to establish the fact of oligospermia (low sperm count) or azoospermia (zero sperm), successive semen analysis must be properly and carefully performed.

The confirmation of oligospermia or azoospermia itself, however, does not establish the condition which DBCP is implicated as causing. That condition, germinal cell aplasia, is described as a lowered number or complete lack of germinal cells within the testis itself. The majority of oligospermia or azoospermia cases are not caused by germinal cell aplasia: but rather, are caused by some sort of blockage between the testis and the external environment. In order to establish that the patient actually has germinal cell aplasia, rather than the much more common blockage that accounts for a low sperm count, it is necessary to perform a testicular biopsy.

Even if a testicular biopsy confirms the condition of germinal cell aplasia, however, a diagnosis of cause cannot be made unless and until further investigation is completed. This investigation would include a complete history of the patient's medical and social history to determine whether other conditions such as radiation or venereal disease could account for the germinal cell aplasia. In addition, a causal diagnosis would include the monitoring of certain hormone levels in the patient including testosterone, follicle stimulating hormone (FSH), and leutenizing hormone (LH). The literature has indicated that when someone is exposed to sufficient DBCP to affect fertility, the levels of testosterone, FSH, and LH, are also affected in a particular manner and with given patterns.

Thus, in order to determine the fact of injury and the question of causation, Dow will seek to discover through witnesses and documents all of the facts in this multi-step analysis. My experience in other DBCP cases indicates that no single person can establish all of these steps alone and no set of documents covers all of these issues. Rather, it is necessary, in order to determine diagnosis and cause, to obtain the testimony of numerous doctors, pathologists, and technicians as well as, often, the plaintiff's wife, her physicians and, often, friends and acquaintances. All of these doctors, pathologists, technicians, wives, friends and acquaintances, will be located in Costa Rica, as will all the relevant documents.

In addition to evidence specifically related to the plaintiffs in this action, Dow will seek to discover information relating to other workers on Costa Rican banana plantations and the effect, if any, of DBCP exposure on

them. As established in the Declaration of Alberto Raven R., employers in Costa Rica must insure their workers against occupational hazards through the National Institute of Insurance (INS). It is my understanding that the INS has substantial work on the effect of DBCP on banana plantation workers in Costa Rica. I am led to believe that the INS had gathered substantial information with respect to numerous workers. In order to establish the affect of DBCP on banana workers in the Costa Rican experience, Dow will seek to discover from the INS the documentation that has been gathered.

It has been my experience in defending DBCP cases that the greatest concentration of evidence most critical to the questions of injury, diagnosis, cause and fault, has always been centered at the situs of the injury where the alleged exposure took place, where the injury was identified and diagnosed, and where the cause was established. In this case, that situs would be Costa Rica and that is where most of the evidence relevant to these cases will be found.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 15, 1987 at Midland, Michigan.

/s/ Jane M. Gootee
JANE M. GOOTEE

Subscribed to and sworn to before me this 15th day of April, 1987.

/s/ Kristine Ann Buch
KRISTINE ANN BUCH,
Notary Public
Midland County, Michigan
My Commission Expires:
8-16-88